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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 IN RE: TERRORIST ATTACKS ON
4 SEPTEMBER 11, 2001

03 MDL 1570 (GBD) (SN)

5 New York, N.Y.
6 February 26, 2019
3:00 p.m.

7 Before:

8 HON. SARAH NETBURN,

9 Magistrate Judge

10 APPEARANCES

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24
25

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(Case called)

MR. GOLDMAN: Jerry Goldman, Anderson Kill, on behalf of the Plaintiffs' Executive Committee and a number of plaintiffs. With me are several of my colleagues, Arthur Armstrong, Stephen Wah and Bruce Strong. Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. COZEN: Steve Cozen, your Honor, from Cozen O'Connor on behalf of the Plaintiffs' Executive Committee.

MR. MALONEY: Good afternoon, your Honor, Andrew Maloney from Kreindler & Kreindler on behalf of the Plaintiffs' Executive Committee.

MR. HAEFELE: Good afternoon, your Honor, Robert Haeefe, Motley Rice, for the Plaintiffs' Executive Committee.

MR. CARTER: Good afternoon, your Honor, Sean Carter, Cozen O'Connor, Plaintiffs Executive Committee.

MR. KREINDLER: Good afternoon, your Honor, Jim Kreindler for the Plaintiffs' Executive Committee.

MS. BENETT: Good afternoon, your Honor, Megan Bennett with Kreindler & Kreindler for the Plaintiffs' Executive Committee.

MR. POUNIAN: And good afternoon, Steve Pounian for the Plaintiffs' Executive committee.

THE COURT: Good afternoon.

MR. RAPAWY: Good afternoon, your Honor, Gregory

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1 Rapawy for the Kingdom of Saudi Arabia. And Mr. Kellogg asked
2 me to express his regrets for not being able to attend. He's
3 currently not able to travel for medical reasons.

4 THE COURT: Okay. I wish him a speedy recovery.

5 MR. SHEN: Good afternoon, your Honor, Andy Shen from
6 the Kellogg Hansen firm for the Kingdom of Saudi Arabia.

7 MR. HUPPERT: Good afternoon, your Honor, Matthew
8 Huppert from the Kellogg Hansen firm also on behalf of the
9 Kingdom of Saudi Arabia.

10 THE COURT: Good afternoon to all counsel and to
11 everybody that's here today. I want to particularly welcome
12 the family members who are here. We appreciate your attendance
13 in the court and we're happy we're able to accommodate you. I
14 hope all of you were able to find a seat. There are still some
15 seats available in the front, so hopefully everybody was able
16 to find some space.

17 A few housekeeping matters, both for the benefit of
18 the people in the gallery and for the benefit of the court
19 reporter, who is arguably the most important person in the
20 room. I want to make sure that everybody always speaks slowly
21 and into a microphone. We have the podium here and it may be
22 easiest if, when people are addressing the Court, they come to
23 the podium. It may be that at a certain point in the
24 conversation we're having a more freewheeling conversation such
25 that it doesn't make sense for people to get up and down from

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1 the podium, so if you are speaking from your counsels' table,
2 if you could make sure that you have a microphone close to you
3 so that everybody can hear you.

4 We're here today on a number of motions. I have lots
5 of things today. I'm also going to thank the lawyers for the
6 excellent work that you all did on the motions. We have a
7 motion regarding supplemental discovery from the kingdom, a
8 motion to compel additional discovery from the kingdom, and
9 then the motion to seal. All of these briefs were excellent,
10 they were very clear, and I feel like I have a pretty good
11 understanding about what the parties are arguing and what their
12 positions are and how they're supported. I'm not going to rule
13 from the bench today, so I will give the end of the story
14 first. And I don't know that I need a significant amount of
15 regurgitation of the motion papers.

16 With respect to motions for discovery, I'm going to
17 invite counsel, if they have some salient points that they want
18 to reinforce to me or if there are particular documents that
19 you think are especially important to highlight for my review.
20 I have read all of the briefs and looked at all of the
21 documents. I think the most efficient way for me to proceed is
22 to hear any final arguments that the parties want to make and
23 then go back and issue a written decision on these discovery
24 disputes.

25 So I will give you an opportunity to speak, but I want

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1 to encourage counsel to make your best effort not to reiterate
2 the voluminous briefing that I have received and reviewed. The
3 same goes for the motion to seal. I have a couple of questions
4 also with respect to that, but again, I have read the briefing
5 and understand the parties' legal arguments, so I don't need
6 full blown argument on the same.

7 The other issue I believe is an open issue for us,
8 which I think is an easy issue, was the 1202 certification that
9 the Plaintiffs' Executive Committee submitted on February 20.
10 There was a flurry of letters related to this certification in
11 a matter of days. I guess just on this particular housekeeping
12 matter, maybe I will address this to the kingdom, have you
13 looked at the proposed order that the Plaintiffs' Executive
14 Committee attached to its February 20 letter?

15 MR. RAPAWY: Yes, your Honor, we did.

16 THE COURT: I understand that you have objections to
17 the plaintiffs' statements of fact as undisputed in their
18 letters. I read their proposed order. I don't think they are
19 asking me to make a judicial finding with respect to those
20 statements of fact. And so my question is whether or not you
21 had any objection to the proposed order just so that I can make
22 that certification and get the documents over.

23 MR. RAPAWY: No, your Honor. If you don't find it
24 necessary to rely on the statement of facts in their letter,
25 the order itself is not objectionable to us.

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1 THE COURT: I don't think so. It seems to me that we
2 could clean the order up slightly. I don't know that it
3 matters one way or the other. In the order it has the Court
4 conclude that the subpoenaed records regarding the issuance or
5 refusal of visa permits to enter the United States may contain
6 relevant information. And there's a comma, and it says
7 "including," and then it has some of the factual statements
8 that the Plaintiffs' Executive Committee are pursuing. It
9 seems to me we get could have a full stop at "may contain
10 relevant information," and that would be adequate. To extent
11 there's any objection with even the characterization of why
12 these things are relevant, I don't know that it really matters
13 one way or the other.

14 MR. RAPAWY: Whatever your Honor wants to do on that
15 issue is fine with us.

16 THE COURT: Mr. Pounian?

17 MR. POUNIAN: Our one concern, your Honor, was that we
18 had negotiated this with the Department of Justice and the
19 Department of State, and we went back and forth on the
20 language, and they required specific findings in the order so
21 that they would then --

22 THE COURT: Findings of relevance as to those specific
23 factual categories?

24 MR. POUNIAN: Yes. And they could go back and make a
25 decision in house to what their position would be as to whether

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1 or not they would release the documents. So they really wanted
2 to know what our litigation position was, which I tried to
3 present sort of generally in the order.

4 THE COURT: Understood. Okay. Then it seems to me it
5 makes sense to sign this as is. Again, it's not the Court
6 making any conclusions of fact related to the plaintiffs'
7 position, it is simply concluding that the material that is
8 being sought from the FBI and the State Department may contain
9 relevant information to certain categories of inquiry.

10 MR. RAPAWY: I understand, your Honor.

11 THE COURT: Great. So I will go ahead and sign that
12 proposed order this afternoon.

13 Let me begin on the discovery question, and I have a
14 question I would like answered from Saudi Arabia before we
15 begin, which is if you could just describe for me what the
16 document world looks like in 1998 to 2002 that you have been
17 looking through. And what I'm trying to better understand is:
18 Are these electronically stored documents? Are you looking
19 through emails, if emails existed then? Are we talking about
20 boxes, actual hard copy files that you're looking through? If
21 you could give me a sense of what type of documents and how you
22 conducted your searches generally in the production that you
23 made thus far.

24 MR. RAPAWY: Yes, your Honor. Am I audible at this
25 point if I speak like this?

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1 THE COURT: I think so.

2 MR. RAPAWY: So there is very little electronic
3 material available from that period. Email did exist, it
4 generally was not used by the relevant agencies and
5 individuals; not to say that no one in the agency was using it,
6 but we did not find any responsive email files that are
7 contemporaneous.

8 There is one work computer I think is addressed a
9 little bit in the papers that belonged to Mr. Al Bayoumi before
10 his retirement, and we did review that and produce essentially
11 everything on it from the relevant date range. There wasn't
12 very much of it, and I don't think plaintiffs found it helpful.
13 There was a back and forth about that.

14 THE COURT: You don't think?

15 MR. RAPAWY: I don't think plaintiffs found it
16 helpful. It had to do with his job responsibilities, it didn't
17 have to do with anything related to this case.

18 Most of the documents are therefore paper. They are
19 stored in various different places either in Saudi Arabia or in
20 the United States in the diplomatic facilities that we
21 searched. We searched the office -- I don't want to recap what
22 is already in the addendum to our brief, your Honor, but I also
23 want to answer your question.

24 We went to the offices of GACA, that the General
25 Authority of Civil Aviation in both Riyadh and Jeddah, and they

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1 have a subsidiary called Saudi Air Navigation Services, SANS,
2 that's also in Jeddah. That's the successor to the ANSS
3 project on which Mr. Al Bayoumi was seconded. So we went to
4 their offices, we went to their warehouses, to the extent they
5 had warehouses, and they had several.

6 We did the same procedure, essentially, with the
7 Ministry of Islamic Affairs in Riyadh. They had documents in
8 their offices, they also had two offsite warehouses, so we went
9 and looked for documents that were relevant there. We also
10 made a number of follow-up requests afterwards, so some
11 documents come to us in electronic form because they were
12 scanned in response to our requests later.

13 With respect to the facilities in the United States,
14 again it was pretty much all paper. We found one set of
15 back-up tapes that we restored. I don't think it had anything
16 at all from the relevant period.

17 The documents at the embassy and the consulate in
18 particular were not really organized by office, and that's the
19 reason that we changed our search protocol. This is noted a
20 little bit in our addendum. And so far as we could manage it,
21 we found every piece of paper mentioning these individuals from
22 the embassy or the consulate during the relevant period, 1998
23 to 2002.

24 Now all this stuff that we're pulling in, with a few
25 exceptions, is almost entirely in Arabic. So we had

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1 Arabic-speaking attorneys or assistants on site with our
2 attorneys when we were pulling these documents. And we hired
3 Navigant to do the document production as well and they had
4 Arabic-speaking folks with us as well. Pretty much everything
5 was pulled on site and brought back to the United States. We
6 got sort of hurried work product translations so we could view
7 the documents for relevance and then loaded them onto an
8 electronic platform and there did the review using the
9 electronic platform. But it was all in paper in the first
10 instance, or almost all; and unfortunately with Arabic, OCR
11 doesn't work very well, so we weren't able to do keyword
12 searches. You have to go pretty much page by page through
13 every document to determine whether it was responsive.

14 THE COURT: Okay, that was helpful. Thank you.

15 Why don't I turn to the plaintiffs. And I don't know
16 who is going to be speaking from this table.

17 Mr. Pounian, let me reiterate that my hope is not to
18 have you recite again chapter and verse the extensive briefing
19 that I have reviewed for today, but if there are certain areas
20 of discovery that you would like to highlight for me, things
21 that you think are particularly important, I am happy to hear
22 from you.

23 MR. POUNIAN: Thank you, your Honor.

24 We just heard Saudi Arabia say they produced every
25 piece of paper with Mr. Thumairy or Mr. Bayoumi's name on it at

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1 their embassy or consulate. And we know that's not true, your
2 Honor. We know that's not true because we obtained documents
3 ourselves, documents that were produced in litigation of the
4 Omar Abdi Mohamed case in San Diego in 2004.

5 And those documents were obtained because the FBI
6 raided Omar Abdi Mohamed's house in San Diego and found out
7 that he was illegally working inside the United States as a
8 propagator for the government of Saudi Arabia. And he was
9 working in fact under Mr. Thumairy at the embassy in Los
10 Angeles. One of the documents that was seized went by the
11 FBI -- and I had prepared an entire PowerPoint presentation,
12 your Honor, which I will not go through with the Court, but if
13 I could just show this one document, which I believe is
14 document 8.

15 I had prepared a book that is with your Honor.

16 THE COURT: Yes, I have it.

17 MR. POUNIAN: This is the Arabic version of document,
18 your Honor. You can see it's from the embassy in Washington,
19 and about if we go to the English version of the document, on
20 the next page, it's a document from the embassy signed by
21 Khalid Suwaylim, who is the director of the Da'wah office in
22 America, who is Thumairy's direct supervisor in Washington at
23 the embassy.

24 This document is dated in January of 1998 and states
25 that this is to inform the propagator that the director of

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1 Da'wah for Europe and America and Australia has approved the
2 nomination of Fahad Thumairy to oversee the propagators in the
3 State of California. And it says, "Please cooperate with him."

4 The propagator is being instructed to cooperate with
5 Mr. Thumairy to promote propagation activities in the State of
6 California. This propagator is in San Diego. And this
7 document tells us that Mr. Thumairy has a boss, Mr. Suwaylim,
8 that someone nominated Mr. Thumairy to this position to oversee
9 propagators, and that someone in Saudi Arabia, a director in
10 Riyadh, approved the nomination.

11 Now we asked for this specific document from the
12 Kingdom of Saudi Arabia. We asked for it repeatedly. And to
13 this day, it has not been produced, despite the search that
14 they say they have conducted. And this document shows that
15 there is a whole chain of command above and below Mr. Thumairy
16 in California going to the embassy and going to Riyadh. That
17 has been denied by Saudi Arabia in this case.

18 So on the first slide, your Honor, is the answer of
19 Saudi Arabia to our interrogatory in which they state they're
20 not currently aware of the identity of any person who
21 supervised, oversaw, provided direction to, or received reports
22 from Al Thumairy during the stated period. Then they go to say
23 specifically at the end, "Mr. Sowaillem did not supervise the
24 substance of Al Thumairy's work." This is their answer to the
25 interrogatory that we received before any of the documents.

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1 And the problem, your Honor, is that in the order of
2 this Court on May 4 of last year, Saudi Arabia was allowed to
3 limit the places that it looked for documents and the manner in
4 which it looked for documents. And we're very concerned that
5 as a result of those limitations, we're not finding documents
6 that the kingdom has. We have no explanation for why this
7 document of Mr. Thumairy has not been produced, as it shows, as
8 I said, a chain of command that's within the government.

9 THE COURT: Sorry, can you walk me through one more
10 time why Exhibit 8 shows what you are saying it shows?

11 MR. POUNIAN: Of course.

12 THE COURT: It's a memo from Mr. Suwaylim.

13 MR. POUNIAN: It's a letter from Mr. Suwaylim to a
14 propagator in San Diego, California whose name is Omar Abdi
15 Mohamed. The name on the letter is actually an alias that Omar
16 Abdi Mohamed was using.

17 THE COURT: So the director of this office in America
18 is telling this propagator --

19 MR. POUNIAN: The director is the person who is
20 Thumairy's superior in Washington who they have identified as
21 his superior in the interrogatory answer, except they claim
22 he's handling only administrative matters. In the
23 interrogatory they say he's only handling things like vacation
24 requests.

25 Here we have a letter in which that same man,

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1 Suwaylim, who is in the embassy in Washington, is directing
2 another Saudi government employee, a propagator named Omar Abdi
3 Mohamed, who in this is called Omar Abdo Al-Khatib, that's his
4 alias who is sponsored in America by Ministry of Islamic
5 Affairs. They're informing him that Riyadh has approved of the
6 nomination of Thumairy to oversee the propagators in
7 California, and he's also instructing him to cooperate with
8 Thumairy --

9 THE COURT: Sorry, where does it --

10 MR. POUNIAN: -- for the propagation activities.

11 THE COURT: I'm not trying to be difficult, I want to
12 make sure I understand, because I know these are the types of
13 documents that you want me to rely on in order to conclude that
14 more discovery needs to be provided.

15 So this letter says that the director of the Da'wah
16 for other areas, Europe, America and Australia, has approved
17 that nomination.

18 MR. POUNIAN: That's correct. He's the superior to
19 Mr. Suwaylim.

20 THE COURT: The director.

21 MR. POUNIAN: The person who is the director for
22 Europe, America and Australia is not named here.

23 THE COURT: And you have been saying that Riyadh
24 approved this --

25 MR. POUNIAN: That's the person who is in Riyadh.

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1 THE COURT: The director is in Riyadh, that's what you
2 mean when you say "Riyadh?"

3 MR. POUNIAN: Yes.

4 And the nomination, we don't know -- we have no
5 documents, we have no documents at all. We did not receive
6 this document from Saudi Arabia. We don't have any of the
7 documents regarding the nomination, the process of the
8 nomination or any documents regarding how this was communicated
9 to Mr. Thumairy, also the propagators that were working
10 underneath Mr. Thumairy.

11 In fact, in this record, your Honor, there's not a
12 single document that is authored by Mr. Thumairy except for
13 vacation requests. There's not a single document from
14 Mr. Thumairy to a propagator, not a single document from
15 Mr. Thumairy doing any day-to-day work activities for the
16 kingdom. And their claim is that he was sent to work as an
17 imam at the King Fahd Mosque in Los Angeles.

18 I want to show your Honor another example. This next
19 slide, your Honor, is a letter again from Mr. Suwaylim to --
20 this is now to all propagators, it's blank, and this was found
21 in Omar Abdi Mohamed's house in San Diego. And it's a letter
22 giving instruction to a propagator in San Diego. And it was
23 obviously sent to all propagators in the United States because
24 it says "blank" on it. And it's instructing the propagators to
25 engage in conversion of non-Muslims, and places an emphasis on

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1 doctors, engineers and pilots.

2 And this is a March 1996 document, which is two months
3 before Mr. Thumairy came to the United States. We don't have
4 any documents that Mr. Thumairy -- we don't have a single
5 document that Mr. Thumairy ever received -- a work document
6 that Mr. Thumairy ever received from Mr. Suwaylim similar to
7 this work document that was only found and that we only have
8 because the FBI raided Omar Abdi Mohamed's house in San Diego.
9 So this is an example of that.

10 And if we go to the next slide, we can also see this
11 is another document from Mr. Suwaylim to Omar Abdi Mohamed that
12 encloses a bonus to him that is being granted to all
13 propagators by Prince Sultan, who was the Minister of Defense
14 and Aviation, who just happens to be the same minister who is
15 above the PCA that was paying Omar Bayoumi. It's the same
16 minister who paid -- whose department was paying Bayoumi was
17 also paying the propagators a bonus. And this is in the year
18 2000 at the time that the hijackers were in California.

19 If we go to the next slide, this is another document I
20 wanted to highlight. This is a portion of the transcript from
21 the Omar Abdi Mohamed trial, and in the transcript they read a
22 letter into the record, and the letter states that there's a
23 propagators' conference, a gathering for propagators in Los
24 Angeles in July of 1999. And there's no question that Thumairy
25 must have played a key role at this conference. He must have

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1 been an organizer of the conference, because this was where he
2 was sent and where he was in charge of all propagators in the
3 state.

4 And we asked Saudi Arabia for the documents about this
5 conference. We knew about it from the Omar Abdi Mohamed case.
6 We did not get the letter that was read into the record at the
7 Omar Abdi Mohamed trial, but we got -- if I could turn your
8 Honor's attention to the next document, which is under seal,
9 it's at tab 12, and to the second page, there is a reference
10 there, your Honor.

11 MR. RAPAWY: Your Honor, I object to the discussion of
12 materials under seal in open court.

13 MR. POUNIAN: I'm not discussing it, I was going to
14 refer the Court to --

15 THE COURT: The highlighted portion.

16 MR. POUNIAN: The highlighted portion, yes.

17 So your Honor, we've asked for the program, the
18 attendees, the documents received by Mr. Thumairy, because this
19 is at a critical time, at a time six months before the
20 hijackers arrived in Los Angeles, and we have received nothing
21 except this under-seal document.

22 Now your Honor, they claim that Mr. Thumairy was
23 working at -- that his job, his sole work was at the King Fahd
24 Mosque, which they describe as a private charity. And we found
25 from the California Secretary of State, your Honor, the list of

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1 the board of directors of the charity that was set up.

2 This document was filed in 1997 by the foundation that
3 leads the mosque, and on the list of the directors are seven
4 Saudi government officials, and there are twelve people on the
5 board. So in 1997 the Saudi government essentially took over
6 control of the King Fahd Mosque by having appointed seven of
7 the twelve directors of the mosque. And if we look at the list
8 of people that are described as being on the board of the
9 mosque as of 1997, they continued in that role until at least
10 August of 2001.

11 Number four on the list is Mr. Suwaylim, who is
12 Mr. Thumairy's supervisor at the embassy in Washington. So
13 Mr. Suwaylim was not only sending letters to propagators in
14 California, letters to all propagators in the United States,
15 all of which Mr. Thumairy should have received and which we
16 have never received in this litigation, but Mr. Suwaylim was
17 overseeing the board that was overseeing Mr. Thumairy at the
18 mosque in Los Angeles.

19 Now in addition to Mr. Suwaylim on the board were two
20 other gentlemen. Number six is the Director of Islamic Affairs
21 at the embassy. And he is a gentleman, your Honor -- if I
22 could beg your indulgence to turn back to tab number seven,
23 this is the interview of Mr. Thumairy with the 9/11 Commission.

24 And he was asked: Do you report to anyone?

25 He said: I report to the Consul General at the Los

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1 Angeles Consulate.

2 And he was asked: Is there anyone in the Saudi
3 Embassy in Washington that you report to?

4 He said he had the most contact with Dr. Majid,
5 responsible for Islamic affairs at the embassy.

6 Also I want to point your Honor to the very beginning
7 where Mr. Thumairy said, when asked, he said he spent 60 to
8 70 percent of his time at the consulate and only about
9 20 percent at the mosque, where he claimed to be an unpaid
10 volunteer.

11 If we go back to the list of the board of directors of
12 the mosque as of 1997 through 2001, we can see not only is
13 Mr. Suwaylim there as number four, but number six is the person
14 in Washington that Mr. Thumairy said that he reported to,
15 Dr. Majid, Islamic Affairs Director at the embassy.

16 And number seven is the consul general, who Thumairy
17 said was his direct supervisor at the time of his interview
18 before the 9/11 Commission.

19 And by the way, your Honor, the 9/11 Commission
20 interview that was conducted is another document we have
21 requested. We only have a memo of that interview, we don't
22 have the actual transcript, which we believe is in the
23 possession of Saudi Arabia. The transcript or a recording of
24 the interview. We would like his actual words and not have to
25 call in witnesses to try to prove what he said.

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1 So at the time Mr. Thumairy was working at the mosque
2 he was under the control of the Saudi government. He was not
3 only under their control on the board, but they are the ones
4 who appointed Mr. Thumairy himself. It's not like he had
5 anything to do with that process. He was sent there by the
6 Saudi government, that was his assignment, and they chose him
7 for that assignment. And yet we have no documents regarding
8 the decision they made, who appointed him, how that was made,
9 or the process that was conducted.

10 And those are documents that we want because we want
11 to know who directed that process, who was in charge of Fahad
12 Thumairy and his role in the United States, who was the person
13 behind the scenes above him who was directing him. That's the
14 purpose of the discovery that we're seeking in this case.

15 Their story is that Fahad Thumairy, straight out of
16 school, went for his first job and they sent him out to Los
17 Angeles without any supervision, any direction, any help, no
18 instructions, no training, and that he was just there working
19 on his own and didn't get any letters from Mr. Suwaylim, didn't
20 get any correspondence with anyone, and just put in vacation
21 requests every year. That's what they're saying to us. And
22 that he didn't do anything for the kingdom. It does not make
23 any sense.

24 Now we have engaged in discovery with the mosque
25 itself. We have served subpoenas on them. And one of the

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1 subpoenas shows the financial control that Saudi Arabia
2 exercises over the mosque. They're not only on the board, they
3 not only appointed the leader, the imam, Mr. Thumairy, but they
4 paid the entire construction expenses of the mosque, and in
5 addition, they're paying the ongoing expenses.

6 And this is an example, this is a letter from the
7 Consul General of Saudi Arabia, and the date of this letter is
8 January 31st, 2000. The hijackers are in Los Angeles, it's
9 almost on the day that they met Omar Bayoumi when he took them
10 under his wing and took them to San Diego. And this letter
11 shows that the consulate is sending a check for \$12,000 to the
12 mosque to cover salaries, and that they're waiting for a check
13 from the royal highness, the prince, to pay back that \$12,000
14 because they're paying the salaries at the mosque.

15 One of the salaries at the mosque was that of Fahad
16 Thumairy, who got \$700 a month from the mosque, and in addition
17 he got other payments, including at one time he got a gift
18 payment of \$10,000 from the mosque that came out of an account
19 that was funded by Saudi Arabia. Yet Saudi Arabia refuses to
20 give us any documents regarding its financing of the mosque.

21 Now at this time, your Honor, the hijackers were at
22 the mosque. They were at the mosque. That's where they went
23 during this two-week period when they were in Los Angeles.
24 They were in the neighborhood and they were at the mosque.
25 This is where they found shelter in Los Angeles. And Saudi

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1 Arabia will not give us the documents regarding the financing
2 of the mosque.

3 Now even the limited documents that Saudi Arabia has
4 produced show that there were people supervising and directing
5 Thumairy, and I want to point your attention, your Honor, it's
6 under seal, it's on tab 15.

7 And this is the performance review of Thumairy signed
8 by Suwaylim.

9 Your Honor, we also asked for work trips of
10 Mr. Thumairy to show what he was doing. If he's assigned to
11 just the mosque, why is he taking work trips?

12 So we made a request for his work trips and got two
13 documents in total, one of which was at the next tab,
14 Exhibit 36 under slide 16, regarding work trips, and this is
15 all the information we got. We're entitled to documents to
16 explain the purpose of the trip, the location of the trip, how
17 it relates to work. What is the trip about?

18 And from our own investigation, your Honor, if we go
19 to the next tab, it would be on the screen, we found from Al
20 Jazeera online that there was a propagators' conference in
21 Europe in September of 2001, that Fahad Thumairy attended. And
22 according to the news article, on September 11, 2001, Fahad
23 Thumairy was working for Saudi Arabia giving lectures in a
24 prison in Sweden. And yet we found no -- we received no
25 documents whatsoever from Saudi Arabia regarding this work trip

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1 and no substantive documents regarding any work trip of Fahad
2 Thumairy. And Saudi Arabia had claimed during this time that
3 he was on a personal leave from the United States on
4 September 11, 2001.

5 So if I could turn your Honor to Mr. Bayoumi, I want
6 to address a few points with regard to the documents related to
7 him. And we heard earlier about his quote, unquote, job
8 responsibilities as the president of civil aviation.

9 Well, from 1995 to 2001, we know that Mr. Bayoumi
10 lived in the United States and he was paid a salary by Saudi
11 Arabia, and he had six different job titles, each one of which
12 was completely phony. He didn't perform any one of those job
13 titles.

14 You heard before about his work computer that they
15 produced to us, which included documents from a date range that
16 covered our requests. Well, it's the first 550 pages of the
17 production in this case, your Honor. Mr. Bayoumi's name does
18 not appear on any single page in those 550 pages. There's no
19 evidence whatsoever that he was ever doing any actual work for
20 the kingdom, any actual work. From the documents we have
21 received, there's no evidence that he was ever doing any actual
22 work. The question is: What was he doing for the kingdom?
23 Why were they paying him a salary?

24 I just want to show you, your Honor, if I could, two
25 exhibits to show the nature of his phony employment. The first

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1 is an April 1999 letter from Saudi Arabia to Dallah Avco, and
2 it instructs Dallah Avco to hire Bayoumi. And he was hired by
3 them at this time as a quote, unquote, account supervisor. And
4 the letter shows -- the first paragraph shows Dallah Avco did
5 not want to hire Mr. Bayoumi. The letter states: You do not
6 have the desire to renew the secondment of Mr. Bayoumi.

7 And Dallah Avco was informed by Saudi Arabia, it says:
8 Headquarters desired to second him for one year only to
9 complete the task for which headquarters agreed upon his
10 secondment.

11 There's no documents regarding what this task is or
12 why Saudi Arabia was requesting that Bayoumi receive this job,
13 this phony job. There's nothing in the record that we have
14 been provided; no documents, no background to this.

15 And this was an order from Saudi Arabia, and the final
16 paragraph says: The company shall draft a letter and serve it
17 on headquarters with all due speed. Which they did the next
18 day, hiring Mr. Bayoumi another year as an account supervisor
19 in the United States in San Diego for a job he never did.

20 The next year, in May 2000, when his secondment for
21 that year was over, he returned to Saudi Arabia for two months.
22 We have no idea what he was doing then, no documents to show
23 what he was doing. But during that time he got another order
24 to go back to the United States and work, this time with a job
25 title of a senior DSS programmer, whatever that is, but it's a

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1 completely phony job. It does not exist for Mr. Bayoumi. He
2 never performed that job.

3 They have not produced a document to explain why he
4 was given these series of phony jobs. And at the time of this
5 last order from Saudi Arabia to Dallah Avco to hire Bayoumi as
6 a programmer, Bayoumi was suddenly given a doubling of his
7 compensation. There's no explanation in the record from Saudi
8 Arabia as to why that was. None whatsoever.

9 So the question is: What was Bayoumi's actual role,
10 and who was instructing him at this time? Who was giving him
11 orders?

12 And we have also asked for documents about all of the
13 contacts that Bayoumi had with various government officials for
14 the government of Saudi Arabia. It's a highly unusual number
15 of contacts that he had. In the first five months of 2000 he
16 had almost a hundred calls with Saudi Arabia government
17 officials, including 30 calls to Mr. Suwaylim's office. 30
18 calls. And these calls occurred between January 17, and I
19 don't recall the date exactly in March -- March 24, 2000, your
20 Honor.

21 Now the hijackers arrived in Los Angeles on
22 January 15, 2000, and early in February they went -- Bayoumi
23 met them in late January, early February, and then brought them
24 to San Diego early in February. And they were there until
25 June, one of them left, and then until December.

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1 And this document shows that Mr. Bayoumi was
2 contacting Mr. Suwaylim at the time he was just about to pick
3 up the hijackers, and at the time he was first starting to
4 arrange all the things he did to take care of them, from
5 signing financial guarantees for them, to finding them an
6 apartment which was right next door to his in the same
7 building, to setting them up with other people that he knew
8 from the mosques that he went to who provided them with false
9 IDs and set them up for flight lessons. That's Mr. Bayoumi.

10 And Bayoumi is calling Suwaylim, and we asked for the
11 phone records of Mr. Suwaylim. Where are the phone records of
12 Mr. Suwaylim? No, they don't exist. We don't have them.
13 What's the explanation? I don't know. I don't know where the
14 phone records are. That's not satisfactory, your Honor. You
15 should order them to produce the records, because this is key,
16 this is key to understanding who was directing Bayoumi and
17 Thumairy at this time. This is at the very heart of the case.

18 Now we also, from our own investigation, have found
19 there are other contacts of Mr. Bayoumi with other Saudi
20 government officials, these from the same ministry as
21 Mr. Suwaylim, Ministry of Islamic Affairs.

22 On December 20, 1999, several weeks before the
23 hijackers arrived in Los Angeles, Mr. Bayoumi checked into a
24 hotel. He lived in San Diego, he's checking into a hotel in
25 Los Angeles near the King Fahd Mosque, and he's checking into

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1 the hotel with someone named Abdullah Jraithen.

2 And we've had this document, it was produced by the
3 FBI as part of the 9/11 investigation. Abdullah Jraithen was
4 never identified. And we conducted an investigation and found
5 his name is spelled incorrectly. The English spelling is
6 Jason. And it turns out that he is a Ministry of Islamic
7 Affairs official in Riyadh who is senior to Mr. Thumairy.

8 So on December 20, 1999, Bayoumi, who lives in San
9 Diego, is checking into a hotel near the mosque where Thumairy
10 works with a senior official from Riyadh of the Ministry of
11 Islamic Affairs. This is at the time that he's an account
12 supervisor for Dallah Avco

13 If we go to the next slide, the FBI 2015 report also
14 shows that Bayoumi, in addition to assisting the two hijackers,
15 assisted two other men named Sadhan and Sudairy. And again, we
16 did not know who these people were. We did an investigation,
17 it's in the affidavit of our investigator, and they were also
18 identified as two Ministry of Islamic Affairs officials from
19 our investigation. And we also learned that they were in San
20 Diego in the year 2000, and they stayed at the same rooming
21 house as the hijackers in San Diego. We don't know if the
22 times exactly coordinate, but we know that they were there.

23 Now the questions raised by all these activities of
24 Mr. Bayoumi are answered in the affidavit of Michael Rochford.
25 He's the former chief of the espionage section of the FBI

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1 counterintelligence division, a 30-year veteran of the FBI. He
2 reviewed all the evidence and concluded that Bayoumi was a
3 covert operative of Saudi Arabia working under the direction of
4 personnel in the Ministry of Islamic Affairs, along with
5 Thumairy.

6 The basis of his opinions include all the cover jobs
7 that were provided by the kingdom to pay Bayoumi, all of his
8 extensive contacts by phone and in person with various Saudi
9 government employees, Bayoumi's use of tradecraft in the way
10 that he met with the hijackers and dealt with the hijackers,
11 all of the lies that Bayoumi and Thumairy told, which we have
12 documented in the record, your Honor. They told lies about
13 each other, about their contacts with each other and their
14 contacts and the manner in which they assisted the hijackers,
15 key events they tried to shield from the authorities who were
16 investigating.

17 Who helped the hijackers? Who helped these two
18 hijackers, who couldn't speak English when they arrived and
19 found a welcome mat at the King Fahd Mosque, and Thumairy and
20 Bayoumi who provided all the assistance to them? Also the
21 tasking that Bayoumi provided through others is a classic
22 espionage operation in which he tasked others who he could
23 separate himself from with the tasks of the phony ID, with the
24 task of the flight schools.

25 And finally, there's the FBI report, the 2012 FBI

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1 report which your Honor has seen before, which states that
2 Bayoumi and Thumairy were tasked with assisting the hijackers.
3 They were given that task. And the reasonable conclusion,
4 really the only reasonable conclusion is someone in the Saudi
5 government gave them that task. And this is one of the
6 documents we have requested from the FBI for the FBI to produce
7 without the redaction in this case.

8 Now your Honor, Mr. Rochford also submitted a
9 supplemental affidavit, which I could refer the Court to. It's
10 under seal because it refers to the FBI documents.

11 Now in this Court's May 24 order, this Court accepted
12 the kingdom's proposal to direct that the discovery proceed in
13 stages. The first stage, the kingdom was allowed to search
14 only limited, specified locations that they selected to start
15 the search. They said that those are the places we will find
16 the documents that respond to the plaintiffs' requests.

17 And this Court order agreed that we should proceed in
18 stages, and that they did not have to search for documents or
19 information that were prepared by its intelligence or law
20 enforcement agencies before 9/11. In other words, if there was
21 someone directing Bayoumi and Thumairy, we would not be able to
22 see that. They would be able to answer the interrogatories and
23 say oh, they didn't do anything, no one was directing them,
24 because they weren't looking at where the information was
25 actually located.

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1 And your Honor, I think it's critical now at this
2 stage where we're at that we move forward to the second stage
3 of discovery with the discovery that we have outlined in our
4 proposed order.

5 And the first step in that process that we have
6 requested is an interrogatory, that Saudi Arabia answers our
7 interrogatory and identifies each repository where responsive
8 documents for Bayoumi and Thumairy are located. We should not
9 be forced to play games wondering where documents are located.
10 We don't know how Saudi Arabia keeps its documents.

11 Your Honor asked the question. I don't know, I cannot
12 answer that question. We should not be playing games in this
13 type of case, in this type of litigation where we're saying you
14 have to prove that a document exists before you can get it.
15 Well, we have proved it. We have shown that they have not
16 produced documents that are in their possession or should be in
17 their possession in this case. We have done that, and we're
18 not in a place now where we should have to be guessing.

19 They should also produce the documents they haven't
20 produced. They should produce them or a privilege log. They
21 have the out of a privilege log, preparing a list, submitting
22 it to your Honor, possibly showing documents in camera. That
23 is the proper procedure under the federal rules. The procedure
24 is not we'll search A, B and C when they know the documents are
25 in Z. That's not the proper procedure for us to follow.

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1 THE COURT: Are you suggesting at this point that they
2 do search their intelligence agencies --

3 MR. POUNIAN: Yes, your Honor.

4 THE COURT: -- for the documents that they reviewed?

5 MR. POUNIAN: We believe that's imperative.

6 THE COURT: And speak to me about sort of the concerns
7 that the kingdom has raised about comity and international
8 relations. We are here on jurisdictional discovery. The
9 kingdom remains a sovereign nation. Talk to me about why you
10 think the law entitles the plaintiffs to inquire into a
11 nation's deliberative processes and investigative efforts when
12 they're here not on merits discovery. The Court has not yet
13 concluded that it has jurisdiction over this country.

14 MR. POUNIAN: I understand, your Honor.

15 THE COURT: So at this stage your presentation was
16 helpful and I appreciate it. I understand why these documents
17 are so critical to you. But there's a tension here, because
18 the kingdom is only partially in this Court at this point. And
19 it may be that ultimately you are able to put forward
20 sufficient evidence so that they are fully engaged in the
21 litigation, at which point in time some of these arguments I
22 think will be more compelling. But if you could help me
23 evaluate or balance those competing interests, which I think
24 are real.

25 MR. POUNIAN: Thank you, your Honor.

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1 Your Honor referred to what it's trying to protect is
2 investigative documents. We're not seeking investigative
3 documents, we're seeking who directed Bayoumi and Thumairy to
4 assist the hijackers. That's the information we really want to
5 obtain, the names of the persons in the Saudi government who
6 were responsible for that. That is the information. It's a
7 different inquiry than seeking investigative documents after
8 9/11. We're looking for documents from before 9/11.

9 THE COURT: I understand, but I thought you were
10 saying you wanted me to direct the kingdom to look at
11 repositories from those post 9/11 investigations which might
12 include memos, which might include contemporaneous records.

13 MR. POUNIAN: That is included in our request, your
14 Honor, but I'm focusing now in terms of intelligence on the
15 pre-9/11, what the instructions were that were given and the
16 directions that were given to Bayoumi and Thumairy before 9/11;
17 not the investigation that was conducted after, but the
18 directions that were given to them in the time, in 2000, who
19 met with them and who directed them.

20 And in terms of comity, your Honor, in this case,
21 comity works both ways. They're a sovereign. They're a
22 sovereign nation. There's comity for their sovereignty. But
23 this case involves an attack on United States sovereignty.
24 There are comity considerations of this country that are
25 embodied in the JASTA legislation, the JASTA statute.

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1 The purpose of JASTA is precisely to permit the
2 discovery that we're seeking regarding the conduct of foreign
3 government agents who came into the United States to perform
4 these acts. If this had happened outside of the United States,
5 then the comity balance may be different, but when there is
6 support to terrorism that results in the worst terror attack in
7 history inside the United States, in that situation the balance
8 of comity is not something that has ever been considered by any
9 other court before. It's unprecedented.

10 THE COURT: I was going to ask you: Is there any law
11 for the proposition that you're stating?

12 MR. POUNIAN: There is law. There is a case in the
13 Ninth Circuit.

14 THE COURT: The *Lu* case?

15 MR. POUNIAN: The *Lu* case, yes.

16 THE COURT: Isn't that a case where China was being
17 sued in its capacity? It was not in jurisdictional discovery.

18 MR. POUNIAN: Well, there was an FSIA issue in the
19 case, but the court ruled they were subject to jurisdiction
20 under the FSIA. That is correct, there is no case --

21 THE COURT: Do you think that's a meaningful
22 distinction?

23 MR. POUNIAN: I don't think in this case it is,
24 because jurisdictional discovery under the JASTA bill is
25 essentially the same as merits discovery. We have to prove the

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1 same elements of the merits case for our JASTA discovery. And
2 for us to say "comity" in this situation, given the facts that
3 we have presented to the Court, given the evidence that is in
4 our under seal submissions, I believe this Court is justified
5 in proceeding.

6 I mean this Court could decide to go through several
7 additional stages; it could decide to have interrogatories
8 first, it could decide to do certain documents that are very
9 targeted depending upon how it wanted to balance the equation,
10 but there's no justification for holding back. We should know
11 the answer to the question of whether someone in the Saudi
12 government instructed Bayoumi and Thumairy to assist the
13 hijackers, because their assistance was critical to the entire
14 9/11 attacks, and it is the key issue in this case, and it is a
15 fundamental issue here.

16 The answer to that question is also the answer to
17 liability, and I think the answer is on the board right now
18 with the FBI document that someone did do it. We're not coming
19 in here like we're fishing for something that may have
20 happened, we know that it happened.

21 And our government hasn't decided to go after Saudi
22 Arabia or after these people, they let them out on diplomatic
23 grounds. They let Thumairy go, they let Omar Abdi Mohamed go
24 and everyone go because it was too difficult a pill for them to
25 swallow diplomatically. But that was resolved in the JASTA

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1 case. We have a civil remedy that Congress expressly enacted
2 to permit the remedy that we are here today before this Court.

3 And if we're going to be denied the discovery of the
4 essential facts in the case, then it's as if there is no remedy
5 at all that was provided by Congress. Congress provided the
6 remedy so I would be here to argue and get the documents from
7 Saudi Arabia. That is the point.

8 THE COURT: Part of your argument generally is we have
9 all these reasons to believe that these two agents were in fact
10 being directed by higher authority, and we have received no
11 documents to substantiate that, but we see a lot of
12 circumstantial evidence. Is there a reason to believe those
13 documents do in fact exist? If it is true what you are
14 proposing, that these two individuals were covert agents, is it
15 possible that there are no documents because people didn't put
16 anything in writing?

17 MR. POUNIAN: I believe there are because I believe
18 that the lack of any documents whatsoever from Saudi Arabia,
19 that the type of discovery that we received, the failure to
20 provide proper discovery, the manner of the discovery indicates
21 that there is a lie at the core of this that is being secreted.
22 And Bayoumi and Thumairy's lying confirms it, and it's repeated
23 now by the behavior of Saudi Arabia in this case. So I believe
24 that.

25 THE COURT: By "that," I assume you're referring to

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1 the issue as to whether or not they're going to represent that
2 he was an employee of --

3 MR. POUNIAN: Why didn't we get the documents of
4 Thumairy? Why didn't we get the document appointing him to be
5 in charge the propagators? Why was that withheld from
6 production?

7 There's a pattern in their production. They withheld
8 entire files of documents that we know exist. They claim that
9 the mosque is a private charity. It's not a private charity,
10 they were controlling it. So it's like: What is going on?
11 Why the phony jobs for Bayoumi? Everything is pointing to the
12 same conclusion as Mr. Rochford put forth in his affidavit, in
13 both of his affidavits.

14 So it strains credulity. The facts are there straight
15 out in front of our faces. The facts are there.

16 THE COURT: Okay. I would like to give Mr. Rapawy
17 time to respond.

18 MR. POUNIAN: If I could say one more thing, I would
19 appreciate it.

20 THE COURT: Sure.

21 MR. POUNIAN: Judge Daniels ordered discovery
22 precisely because Saudi Arabia had not submitted any evidence
23 in response to our submissions in opposition to the motion to
24 dismiss, and Judge Daniels said they were in the best position
25 to shed light on the inquiry, that Saudi Arabia was in the best

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1 position. And we come in here, we were proceeding with
2 discovery, and we're in the same situation now. We're waiting.
3 And in Judge Daniels' words, it's time for Saudi Arabia to shed
4 some light on the questions in this case.

5 That's all I have, your Honor.

6 THE COURT: Thank you.

7 MR. CARTER: Your Honor, I have one or two points.

8 THE COURT: They need to be said into a microphone.

9 MR. CARTER: Thank you, your Honor.

10 THE COURT: If you could keep it brief, I would
11 appreciate it.

12 MR. CARTER: I will, your Honor. Your Honor asked a
13 moment ago about our request that Saudi Arabia search in its
14 intelligence files and raise the issue of investigative
15 matters, and I do think that's a bit of a red herring.

16 The essential issue that we're most interested in here
17 runs to the heart of the agency question for which discovery
18 was authorized. And the question is essentially whether or not
19 Omar Al Bayoumi, Fahad Al Thumairy, or any of the other
20 government officials for whom the Court has authorized
21 discovery were recruited by, trained by, tasked by, funded by,
22 receiving direction from or reporting to representatives of
23 Saudi intelligence who most certainly were housed in the
24 embassies and consulates where both had substantial
25 connections.

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1 With regard to your Honor's question about the
2 difference as between jurisdictional discovery and merits
3 discovery, I don't believe that there's any distinction as to
4 matters for which discovery has been authorized, your Honor.
5 So the matters for which discovery has been authorized, the
6 federal rules apply as if in any other case, again, with regard
7 to those matters. And that would require Saudi Arabia, like
8 any defendant, to search in any repositories where it
9 reasonably believes that responsive documents are located.

10 Now in the context of the consideration of JASTA,
11 Saudi Arabia was well represented by many lobbyists and law
12 firms who consistently argued to Congress that Congress should
13 not pass JASTA because JASTA cases would invariably involve
14 discovery into sensitive intelligence matters. And Congress
15 said: Tough luck, we're going to allow this to go forward.

16 If Saudi Arabia wants to claim that responsive
17 documents in those files are protected in some way, it has to
18 invoke the traditional process of the rules; it can provide a
19 privilege log, they can ask your Honor to review them in
20 camera. But the answer is not simply to broadly immunize Saudi
21 Arabia from ever looking or telling us if the documents are
22 there.

23 Virtually any JASTA case, your Honor, will involve
24 activities most likely to have been carried out through an
25 intelligence agency. And let me give your Honor two examples.

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1 There have been concerns for a long time in U.S. national
2 security circles that North Korea could mobilize its
3 substantial hacking capabilities to cause a catastrophic
4 physical event on U.S. soil; attacking a nuclear facility,
5 attacking a transportation hub, something of that nature. That
6 is a quintessential JASTA case. That activity by North Korea
7 would be carried out by its intelligence agency. So to
8 immunize discovery is to gut JASTA.

9 The same goes for Vladimir Putin sending agents out to
10 the United States to kill somebody he doesn't like who happens
11 to be in the U.S., something that he reportedly has done in
12 Europe. Again, that would be done by an intelligence arm. And
13 the essential question in that case under JASTA would be: Were
14 they acting as agents of that foreign government? And the
15 answer to that question would reside solely in the intelligence
16 agency.

17 And so that is why it's essential that we find out
18 whether or not these people were taking direction. And we have
19 given quite a bit of information to suggest that they were.
20 Mr. Pounian mentioned the extensive tradecraft surveyed in
21 Mr. Rochford's affidavit employed by Bayoumi in providing
22 support for the hijackers. Again, that is very compelling
23 evidence that he was trained by Saudi intelligence. His
24 contacts with the embassy and consulate are such that one would
25 almost certainly be sure that intelligence would have reporting

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1 about what he was doing.

2 So there's some matters that we've put in the record
3 that I can't discuss in an open courtroom, but certainly
4 Mr. Rochford's supplemental affidavit at paragraph 48 and
5 reference to an FBI document bearing Bates stamp 44, as well as
6 paragraph 32, I think provide substantial predication for this
7 request, along with the overall affidavit.

8 One other thing, your Honor, just big picture here,
9 we're obviously concerned that the reason we don't see the
10 documents is because we don't think Saudi Arabia has looked in
11 the right places using the right search terms or during the
12 right time periods.

13 Let me give your Honor one example. Saudi Arabia said
14 it would search the Ministry of Islamic Affairs for any
15 documents referencing Thumairy by name. And on its face that
16 sounds somewhat appealing. The problem is we know from the
17 documents in the Abdi Mohamed case that Saudi Arabia
18 communicated to people who were acting as propagators via
19 generalized communiques to all propagators. Thumairy would
20 have received those in that role, but none of them have his
21 name on them. So we have asked that we receive all of the
22 communiques that were issued to propagators in the United
23 States during the relevant time period. They will show the
24 hierarchy of command, they will show what the duties and
25 responsibilities of these folks were, and they will shed some

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1 light on what Thumairy was really doing here. If there are no
2 documents by his name, we need to understand what people in his
3 position did.

4 Those are the principal issues that I wanted to raise.

5 THE COURT: Thank you.

6 All right. Mr. Rapawy, you may proceed.

7 MR. RAPAWY: Thank you, your Honor.

8 Your Honor, Saudi Arabia has been thorough and open in
9 complying with the limited, targeted jurisdictional discovery
10 ordered by this Court, and that jurisdictional discovery is
11 circumscribed, as your Honor acknowledged earlier, to
12 accommodate Saudi Arabia's legitimate interests as a foreign
13 sovereign.

14 THE COURT: Do you want to address Mr. Carter's
15 comment that although the scope of the discovery may be limited
16 by Judge Daniels' order, the depth of that discovery should not
17 be limited, it should be as deep and comprehensive as the rules
18 permit?

19 MR. RAPAWY: So I do think that your Honor's May order
20 directly recognized that the balancing continues as you
21 implement the scope of Judge Daniels' order. And we had
22 proposed, and the Court accepted with some modifications,
23 limits on the scope of jurisdictional discovery. For example,
24 you added some time and you added the PSS documents that were
25 in their possession that were originally with other agents,

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1 security documents, and we did produce those.

2 I think to say that -- I'm not sure exactly what
3 Mr. Carter means, but if the idea is that once we're into
4 jurisdictional discovery all bets are off and every filing in
5 the possession of Saudi Arabia is potentially open to
6 discovery, we very much disagree with that. I think your Honor
7 rejected that before, and I don't think there's any way to
8 reconcile that with the idea of limited and targeted
9 jurisdictional discovery.

10 So we have gone forward on the basis of your Honor's
11 earlier order authorizing us to search specific places,
12 specific times, and those searches have produced no information
13 suggesting that Mr. Al Bayoumi or Mr. Al Thumairy were acting
14 at the direction of some unnamed senior Saudi official in the
15 embassy or elsewhere.

16 To the contrary, discovery has undermined plaintiffs'
17 theory, in particular by failing to show any evidence about the
18 formerly crucial meeting of Mr. Al Thumairy and Mr. Al Bayoumi
19 at the consulate before Mr. Al Bayoumi met the two hijackers at
20 the restaurant. That was absolutely a key part of plaintiffs'
21 previous showing. And I don't know if they would have gotten
22 jurisdictional discovery if they hadn't made that allegation.
23 Their recent filings have moved sharply away from that. It did
24 not happen. There is no reason to think that renewed or
25 broadened searches would reveal any such evidence.

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1 THE COURT: Do you want to speak specifically to some
2 of the gaps that Mr. Pounian referenced? The fact that there
3 were conferences that were planned that Mr. Thumairy would have
4 undoubtedly been involved in, no documents regarding that work
5 was provided, or documents related to official travel which we
6 know was approved, but we don't know where he was going or why
7 he was going and what his assignment was for that. Or with
8 respect to Mr. Bayoumi, the piece that Mr. Pounian highlighted
9 with respect to requiring Dallah Avco to renew the secondment.

10 MR. RAPAWY: Yes, your Honor. With regard to --
11 sorry, the second point was travel documents, the first point
12 was --

13 THE COURT: The conference in '99.

14 MR. RAPAWY: We did in fact produce documents about
15 that conference, your Honor. We did not exclude any documents
16 relating to Mr. Al Thumairy in that conference. It was in
17 1999. There are actually no allegations about it within pages
18 19 to 23, but insofar as we had that document, we produced it,
19 we didn't withhold anything about that conference that we're
20 aware of, and certainly nothing about Mr. Thumairy's
21 involvement in that conference.

22 With regard to Mr. Carter's argument about only
23 searching for Mr. Al Thumairy's name, when Mr. Carter raised
24 that point with us, when plaintiffs raised that point with us
25 in meet and confer negotiations, we actually agreed to go back

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1 and look more generally for documents that deal with the
2 responsibilities of people with job title of propagator or
3 guide. So that is actually not something we refused to do, it
4 was something that didn't happen before the motion to compel
5 because it was raised fairly late in the game. And the letters
6 back and forth on that issue are all part of Plaintiff's
7 Exhibit 7. I don't have an exact cite for your Honor.

8 So then the travel documents. We looked for travel
9 documents. We actually produced a fair number of travel
10 documents that are cited in our brief. The argument is here
11 there must have been more, there must have been more details
12 about what he was doing in his travels and why. And that is
13 not a basis to grant a motion to compel.

14 We haven't withheld documents about why Mr. Al
15 Thumairy was traveling to particular places. We haven't
16 refused to look for documents for why Mr. Al Thumairy was
17 traveling to particular places. Those documents, as far as we
18 can tell, the embassy and the consulate don't have them,
19 neither does the Ministry of Islamic Affairs, which we've also
20 searched. And recognizing, your Honor, that these are
21 20-year-old documents, that they're in another language, that
22 we're doing the best we can and it's always possible that we'll
23 make mistakes, but we have made a reasonable search.

24 I also want to go quickly to the document that
25 Mr. Pounian referenced at the start of his presentation, which

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1 has Bates number DOJ 10. It's a letter that they got from the
2 Abdi Mohamed proceeding.

3 Now as an initial matter, discovery concerning
4 Mr. Abdi Mohamed was specifically denied by Judge Daniels in
5 the March 28 order. But leaving that aside, when they came to
6 us and said well, we want to see this document, we did not say
7 we won't look for it, we said we'll go back and look for it
8 again.

9 And DOJ produced a copy of the document -- it's not
10 sealed, it's an unsealed version of the document that you
11 saw -- shortly before the motion to compel. And with that, we
12 went back and looked again. We do not have that particular
13 document, but as a result of follow-up searches that we
14 voluntarily agreed to do, we have found a related document that
15 is addressed to Mr. Al Thumairy, and I expect we'll be
16 producing that to plaintiff shortly.

17 So with regard to the idea that there are gaps in our
18 production, we did not refuse to meet and confer with
19 plaintiffs about the alleged gaps. We did not refuse to go
20 back and look for a lot of things that plaintiffs wanted us to
21 look for. And that is set forth in Exhibit 7. And we have a
22 count of how many of those requests we agreed to in our
23 addendum, and it was quite a few.

24 So our approach through this process has been to try
25 to approach it in a reasonable and cooperative fashion. But

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1 the only thing that would actually satisfy plaintiffs would, of
2 course, be documents proving our client's guilt, which don't
3 exist because the things that plaintiffs say happened did not
4 in fact happen.

5 THE COURT: When we began this conference I asked you
6 if you could tell me generally sort of what the documents look
7 like, whether they were electronic or paper, and sort of how
8 you went about your investigation to find responsive documents.
9 And you the mentioned to me, if my notes are accurate, that in
10 addition to searching the embassy and the consulate, that there
11 are also warehouses I think in Jeddah, that you searched for
12 the aviation agency and the Ministry of Islamic Affairs, is
13 that correct?

14 MR. RAPAWY: If I recall correctly, your Honor, the
15 Islamic Affairs warehouses were in Riyadh, and there were --
16 the warehouse was for the aviation agency, but yes, that's
17 correct.

18 THE COURT: And with respect to the Ministry of
19 Islamic Affairs, my understanding based on the motion, which is
20 stylized as a motion for supplemental discovery, which is
21 different than the motion stylized as the motion to compel, so
22 this is the motion on the supplemental discovery that was
23 sought from the kingdom --

24 MR. RAPAWY: Yes, your Honor.

25 THE COURT: -- before the motion to compel, that you

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1 were objecting in large part to searching the Ministry of
2 Islamic Affairs other than for sort of very targeted documents
3 such as personnel files and other limited information, but
4 that, generally speaking, you were really focusing your efforts
5 at the embassy and the consulate. Is that an accurate
6 representation?

7 MR. RAPAWY: I think it is largely an accurate
8 representation, your Honor. Mr. Shen was actually going to
9 address the supplemental discovery motion, but I could
10 certainly answer the question.

11 We have not certainly refused entirely to go back to
12 Islamic Affairs. We were going to focus on personnel files
13 with regard to individuals.

14 Insofar as activities in the United States, we thought
15 it was a reasonable position to get the personnel files from
16 the whole ministry, whatever that happened to be, and then look
17 for documents about specific activities in the embassy and
18 consulate. That seemed like a reasonable compromise or
19 limitation.

20 MR. SHEN: Your Honor, if I could interject here, what
21 Mr. Rapawy was discussing was with respect to the supplemental
22 discovery of the additional individuals. With respect to
23 Mr. Al Thumairy, we did do a comprehensive search of the
24 Ministry of Islamic Affairs. It was not all limited to the
25 personnel files.

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1 THE COURT: So you searched for documents that would
2 include who was tasking him for what type of assignment, why he
3 was being nominated for positions and renewed for positions,
4 and all of that?

5 MR. SHEN: Yes, your Honor, we did.

6 MR. RAPAWY: Yes. I apologize if I was unclear, your
7 Honor. The supplemental discovery limits that we proposed are
8 separate from the much broader searches that we did in the
9 first round of discovery. And to the extent we found documents
10 about who was being assigned to do what, we certainly
11 considered those responsive and we searched for them. We would
12 not have excluded those from the search of the Ministry of
13 Islamic Affairs.

14 I think what you're largely faced with is a complaint
15 that although we did the searches, we must have done the
16 searches unreasonably because there must have been more
17 documents. And that, I don't think, is how this Court should
18 proceed on a motion to compel.

19 I wanted to address briefly plaintiffs' general
20 request for a search of all documents in the possession of
21 Saudi Arabia or possibly an interrogatory answer that would
22 effectively have the same result, since we would have to verify
23 what the documents were before we could give that answer.

24 We do think that would be inconsistent with the
25 concept of limited, targeted jurisdictional discovery. The

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1 cases that they cite in the reply on this point was the
2 *Argentina* case in the Supreme Court in 2014, which is, I think,
3 completely distinguishable because that case involved a
4 situation in which the foreign sovereign waived jurisdictional
5 immunity, was found liable, and was contesting the scope of
6 discovery in aid of execution. And there the Supreme Court
7 said well, the FSIA has nothing really to say about discovery
8 in aid of execution once you've been found liable. But the
9 FSIA certainly does have something to say about need to find a
10 foreign sovereign properly subject to the jurisdiction of the
11 Court before the burdens of litigation and of discovery can be
12 imposed on it.

13 And as far as the *Lu* case from the Ninth Circuit is
14 concerned, I just wanted to note the Ninth Circuit relied on
15 public findings that had already been made in the courts of
16 Taiwan. It's a little confusing because they say the Republic
17 of China, but in this case that's referring to Taiwan. And
18 there was no discovery ordered into intelligence agencies
19 there.

20 With respect to potential searches of the intelligence
21 agencies, there is no showing that material contemporaneous
22 documents are likely to be located in the possession of those
23 agencies. Judge Daniels did not rely on their allegations that
24 Omar Al Bayoumi was a spy, and discovery has not given them
25 anything in support of that.

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1 I can't discuss the FBI productions in open court, but
2 your Honor has them, and you have already stated you read them.
3 And I'm confident that from that you will draw the conclusion
4 that those documents have not strengthened their hand.

5 If they had the evidence, you would be seeing it cited
6 directly in their papers, you would not see references to the
7 affidavits of Mr. Rochford, who is basically purporting to act
8 as an expert but really attempting to tell the Court what
9 inferences it should draw from essentially innocent facts.

10 I'm not sure how much they're currently focusing on
11 post 9/11 investigative files, but we do also strongly object
12 to the suggestion those are properly within the scope of
13 discovery. Those files would be confidential for much of the
14 same reasons that the FBI in this case, to the extent it made a
15 production, has insisted that those files be kept confidential
16 from foreign nationals. So our own co-counsel who are working
17 on our case, to the extent they're Saudi nationals without a
18 permanent presence in the United States and not within the
19 jurisdiction of this Court, can't see the FBI documents because
20 the FBI considered the sovereign interests of the United States
21 to outweigh any right those individuals might have to see it.

22 And of course, Saudi Arabia could not obtain any
23 similar protections. Plaintiffs are not -- in Saudi Arabia are
24 not subject to the jurisdiction of this Court. And once the
25 documents were produced -- frankly, your Honor, our firm is not

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1 in Saudi Arabia, we're not subject to its jurisdiction. It
2 would be problematic even for the attorneys of our firm to be
3 asked to review those types of documents for the purpose of
4 determining whether they could be placed in a privilege log,
5 which is why I think that is not an adequate suggestion.

6 They mentioned a number of other agencies in their
7 proposed order, but they didn't really come up today; foreign
8 affairs, interior, finance, a couple of others, and I will rest
9 on the briefs with regard to those. I don't want to
10 unnecessarily prolong this.

11 With regard to the timeframe question, the focus of
12 jurisdictional discovery here is the portion of the year 2000
13 during which two 9/11 hijackers were in San Diego, first in Los
14 Angeles and then San Diego. And the only concrete
15 allegations --

16 THE COURT: I'm sorry, could you speak a little more
17 slowly, please?

18 MR. RAPAWY: Yes.

19 THE COURT: Thank you.

20 MR. RAPAWY: The concrete allegations from that period
21 focus on the very first case of February 2002 when Mr. Al
22 Thumairy supposedly met with Mr. Al Bayoumi at the consulate
23 and Mr. Al Bayoumi supposedly helped the two men find an
24 apartment.

25 So the purpose of jurisdictional discovery here is to

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1 verify or to refute plaintiffs' allegations that these two men
2 assisted the hijackers during that period based on instructions
3 from some unnamed senior official of the Saudi government.
4 Leaving aside they found no support for that, the 9/11 report
5 itself indicates that Al Qaeda began planning the 9/11
6 operation in earnest in late to 1998 to early 1999. That's
7 page 150 of the 9/11 report, which is already in the record.
8 So the suggestion you will find documents relevant to this
9 targeted exercise by going before 1998 is difficult to fathom.

10 The documents after 2002 are not within the scope
11 because the only documents that you're going to find from that
12 period are the post investigative documents. We have made
13 certain limited voluntary exceptions to that, such as documents
14 relating to Mr. Al Thumairy's expulsion from the United States.
15 We searched for the documents, we produced them, plaintiffs
16 have them.

17 We also voluntarily produced entire personnel files
18 regardless of date range because those documents were all in
19 one place. It was easy to collect them. The burden wasn't
20 great. We found no reason to withhold them. But to go back
21 now and add more searches for more ministries or for a broader
22 time frame would delay this process for no real purpose.

23 And I do want to address in that context Mr. Pounian's
24 suggestion that there should be multiple stages to sort of ease
25 into this, and maybe start with interrogatories first and come

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1 back again. We very much disagree with that, your Honor. We
2 think that your Honor should issue an order, and if you tell us
3 to do more, we will go and do more, and we will do it as
4 quickly as we can. And we want to get to depositions and our
5 renewed motion to dismiss, because we are quite confident at
6 the end of the day that the Court would not -- there would not
7 be a basis for the Court to find jurisdiction here.

8 With regard to specific complaints about our search of
9 production, some of which I already addressed, the question of
10 Mr. Al Thumairy's employment, his job during the relevant
11 period was indeed imam at the King Fahd Mosque. He didn't have
12 an office at the consulate. He didn't work there. If you dig
13 through the confidential documents, there are certainly
14 conflicting statements in the documents about that issue, but
15 we have given plaintiffs and you our best understanding based
16 on our reasonable investigation, which has included interviews
17 of the individuals we could access and were likely to have
18 knowledge of that information.

19 And then on top of that, we went to the embassy and
20 the consulate and we looked for all the documents that we could
21 find. We produced those, and those do not suggest anything
22 contrary to what we're telling the Court today. So the
23 plaintiffs have responsive documents, they have answers to
24 their interrogatories. I'm not sure what they want. If they
25 would like to ask Mr. Thumairy about his prior statements at

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1 his deposition, that's completely fair game, but they don't
2 need more documents to do that.

3 With regard to scope of the --

4 THE COURT: Could I ask you a question about funding
5 of the mosque?

6 MR. RAPAWY: Yes, your Honor.

7 THE COURT: Mr. Pounian discussed, both when he
8 provided the registration or the filing of the California
9 Secretary of State for the letters of incorporation for the
10 mosque indicating that it was largely controlled by Saudi
11 officials, and a reference to Saudi funding of the mosque, and
12 the reference to the appointment of Al Thumairy by Saudi
13 officials, so can you talk a little bit about the role Saudi
14 Arabia played with respect to the mosque?

15 MR. RAPAWY: Yes, your Honor. So the mosque has been
16 run by an organization called the Ibn Taymiyah Foundation,
17 which is, contrary to Mr. Pounian's statements, a private
18 California charity.

19 There actually was -- I wanted to address one point
20 they made in their reply papers on this subject. The Ibn
21 Taymiyah Mosque existed even before it became the King Fahd
22 Mosque. So when Mr. Thumairy originally went out there, it was
23 before the mosque was called the King Fahd Mosque, and also I
24 believe it was before any of the individuals were on the board.
25 They were added to the board as part of the change of the name

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1 of the mosque that the foundation runs when the late King Fahd
2 gave a large donation to have the mosque rebuilt, and it was
3 named after him after that occurred. We have searched for and
4 produced documents related to the composition of the board of
5 the mosque, which was one of plaintiffs' document requests.
6 And we did not, frankly, find much, but we gave them anything
7 in that category that we found.

8 And then at some later date the mosque began to --
9 some of this stuff is confidential, your Honor, the documents
10 are in the papers. But the California Secretary of State
11 filings are public, and what they show is after a certain
12 number of years the other members of the board of the mosque,
13 the ones who were not Saudi Arabia officials, went back to the
14 California Secretary of State and said these people who were
15 named as officials by Saudi Arabia have not been coming to
16 board meetings or actively participating in the management of
17 the mosque. This was all cited in the papers as part of a
18 third-party production from the mosque which plaintiffs got.

19 And after that, I don't actually know whether the
20 California Secretary of State formally approved the removal of
21 those individuals from the board, but I do know that to the
22 extent there were additional payments made to the mosque, there
23 were donations of various sorts, and there was at least one --
24 that's confidential.

25 Sorry, your Honor, it's difficult to do this without a

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1 redacted copy in front of me.

2 THE COURT: I understand. I am familiar with the
3 arguments in your brief, so if you want to rest on that.

4 MR. RAPAWY: I think the main point is to the extent
5 this is alleged to have been a Saudi government run or
6 controlled mosque, we don't think they have shown that. We
7 don't think that was actually the case. And the funding was
8 largely -- not entirely, but largely the one large donation
9 that King Fahd made to rebuild the mosque which was renamed
10 after him, and that was well before the -- I mean the idea that
11 that had something to do with 9/11 attacks is completely
12 unsupported speculation and there is no basis for the
13 suggestion.

14 So we produced the letter, or we have found -- we will
15 produce the letter concerning Mr. Thumairy's supervisory
16 responsibilities. I wanted to say in that context, or to refer
17 the Court back to the portions of the May 28 order that discuss
18 the Abdi Mohamed allegations in which Judge Daniels found that
19 there was no non-speculative basis that anyone who was a Saudi
20 propagator had done anything to help the hijackers.

21 I would like to touch briefly on the questions with
22 regard to Mr. Al Bayoumi's employment. We have produced
23 documents showing that during the relevant period he was an
24 employee of the Presidency of Civil Aviation. He was either
25 seconded Dallah Avco under the ANSS contract or he was on

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1 unpaid leave. His own responsibilities, so far as we have been
2 able to determine, during the period of his secondment and
3 leave, was pursuing his education in the United States. And I
4 think that Plaintiff's Exhibit 5 says this. So I would
5 disagree with the suggestion that was made earlier that we have
6 produced no documents about this.

7 We have also produced documents about what his
8 education was, transcripts showing that he attended classes,
9 computer English classes, computer classes, an unfinished
10 course of study in accounting, and ultimately two master's
11 degrees. So the statement in the papers that he just didn't
12 attend classes are not true.

13 There have been many documents in the Dallah Avco
14 production showing how he was paid through the ANSS contract,
15 and some of those have been discussed before. All I could
16 really say about those documents is that they don't suggest we
17 withheld them. Dallah Avco had those documents as the
18 contractor of the ANNS contract. They have produced them,
19 plaintiffs have them, and they can make what use they like of
20 them at Mr. Bayoumi's deposition.

21 I do not think that those documents show or suggest
22 that he was acting in some kind of covert role as a spy or a
23 secret agent, and they certainly do not suggest the key point
24 which the Court is going to have to decide on the renewed
25 motion to dismiss, which is that he was acting on instructions

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1 from some hidden source when he met with the two hijackers.

2 With regard to the question about his pay raise, we
3 have produced everything we have on that. I understand that
4 the aviation authority's documents show that he was on unpaid
5 leave. Dallah Avco documents show he was rehired and needed to
6 be paid. Whatever that is worth and whatever it can prove, you
7 have the documents from both parties on this, and there's
8 simply nothing further for the Court to compel.

9 And I wanted to also touch briefly on the fact -- it
10 was towards the end of Mr. Pounian's argument he raised the
11 allegations about Mr. Al Dryfan, Mr. Al Sadan and Mr. Al
12 Sudairy. I'm sure the Court recalls this, but supplemental
13 discovery of those individual was explicitly denied. So the
14 complaint that we did not produce documents on those I think is
15 in the nature of a motion for reconsideration, and I don't
16 think that it's timely or there's a sufficient basis laid for
17 it.

18 Does your Honor have further questions with regard to
19 the motion to compel?

20 THE COURT: I don't believe so.

21 MR. RAPAWY: As I mentioned, my colleague, Mr. Shen,
22 is planning to address the motion on supplemental discovery and
23 will also address the confidentiality motion.

24 THE COURT: Okay.

25 MR. RAPAWY: Thank you, your Honor.

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1 MR. POUNIAN: May I be heard briefly, your Honor?

2 THE COURT: Briefly. I started this conference by
3 saying I did not want to have a full-blown oral argument on the
4 discovery motion, and here we are two hours into it.

5 MR. POUNIAN: I think I may have had something to do
6 with that, your Honor.

7 Up one of the slides I had to show your Honor was
8 Mr. Kellogg's statement before this Court when he was standing
9 here in 2015, and he told the Court that Mr. Thumairy was an
10 employee of the embassy, that he was working for the embassy.
11 And now in 2019 when it's time for discovery, we hear from
12 Saudi Arabia he was not an employee of the embassy or the
13 consulate. And yet from the documents we find, we find
14 Suwaylim sending documents announcing Thumairy's position as
15 lead propagator in California, which is indicating that he is
16 reporting to the embassy in Washington. So there's a conflict
17 here in facts, and we're entitled to discovery on that.

18 And their position has changed over time. It's
19 changed from 2015 to today. Before JASTA and then after JASTA
20 they have altered their position in the facts, and they're now
21 trying to escape producing discovery that they have.

22 Now they say they have one letter. Where is it? What
23 is it? Why don't they have the letter that we found that was
24 seized by the FBI? And at the time that they seized that
25 letter there were 60 documents on the letterhead of the Kingdom

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1 of Saudi Arabia that were seized from Abdi Mohamed. We haven't
2 gotten any document that was sent to Thumairy. Why is that?
3 What is the reason for that?

4 In terms of Bayoumi being a student, why was he given
5 a phony job? Was he just brought here as a student? Why all
6 the shenanigans with the DSS programmer, account supervisor,
7 what was the reason for that? Why didn't he just come in as a
8 student? And in the final year, in 2000 when he came back, he
9 didn't even have a student visa, he couldn't even be a student.

10 And the FBI in their report that I showed your Honor
11 earlier found that he did not attend classes. So it's a
12 classic -- one of Mr. Rochford's analysis actually is that it's
13 a classic cover for someone to be a student to get into the
14 student community, because his job was to do intelligence on
15 local Saudis in the community. So it was all part of what he
16 was doing for Saudi Arabia.

17 All we've heard from Saudi Arabia is there's no
18 evidence that they presented. As Judge Daniels said, they have
19 not come forward with evidence, they're coming forward with
20 words. There's no affidavits. They're not willing to answer
21 questions. They're just saying shut discovery down, we don't
22 want to do discovery. That's wrong, your Honor. They should
23 have to come forward and answer questions that are based on
24 what we have shown today before your Honor.

25 One element that was just raised, talking about the

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1 meeting at the consulate, that somehow our theory has been
2 undermined because now there's a question about the meeting at
3 the consulate. I urge the Court it's a completely misleading
4 argument regarding the facts. The facts are in the sealed
5 documents before your Honor.

6 But I can tell you one thing that is in the public
7 record and what Bayoumi truly lied about was he said he never
8 went to the King Fahd Mosque that day. That's what he said.
9 He said: I didn't go to the mosque. He was trying to hide his
10 connection with the mosque on that day. And actually there's
11 also evidence in the public record he went there twice that
12 day. Twice that day. And there's additional facts in the
13 under seal documents before your Honor that shows some of what
14 was going on during those visits.

15 I think that's all I have for now, your Honor. I
16 think Mr. Carter may have some more.

17 THE COURT: I think that Mr. Rapawy wanted to say
18 something briefly.

19 MR. RAPAWY: I did, your Honor, very briefly on the
20 subject of Mr. Kellogg's previous statement, because he isn't
21 here to defend himself. That was a hearing on a motion to
22 dismiss, and at the time we accepted plaintiffs' allegation
23 that Mr. Thumairy was an embassy employee. Discovery has shown
24 otherwise. Thank you, your Honor.

25 THE COURT: Thank you.

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1 MR. CARTER: Your Honor, I will be very brief. Just
2 initially I wanted to say that Mr. Rapawy repeatedly suggested
3 the scope of discovery was essentially limited to whether or
4 not there's some phone call or communique from a senior Saudi
5 official to Thumairy telling him to go do this. And that's not
6 correct. And I think we outlined in the papers the scope of
7 discovery concerns the agency by Thumairy and the others that
8 were involved.

9 And the decision in *Reese*, which is cited in the
10 papers, I think is most directly on point. It's an FSIA case
11 about agency, and it makes clear that agency just doesn't
12 materialize at a moment in time in an individual transaction,
13 you need context, you need to understand the origins of it.
14 Which is why we asked, to better understand why Bayoumi was
15 deployed in the United States, what was going on with the King
16 Fahd Mosque that resulted not only in the funding but the
17 contemporaneous deployment of Thumairy to work at that
18 facility.

19 You also heard Mr. Rapawy say that when we raised the
20 issue of the duties of propagators they agreed to look for
21 documents about the duties of the propagators. The problem is
22 what we really asked for is communiques that were being issued
23 to communicate with the propagators and guides in the United
24 States during this period so we could better understand what
25 kind of communications were being received by Thumairy and his

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1 peers. That's a different set of documents than they're
2 talking about.

3 It's the same scenario we get when we approach them
4 about the document from Suwaylim to Abdi Mohamed. They agreed
5 to go back and look for that document, but our real complaint
6 was that the letter describes a nomination process, an approval
7 process, a communication from Saudi Arabia to Suwaylim telling
8 them that Thumairy has been approved, and then a communication
9 going out from Suwaylim telling other people. We're interested
10 in all of it, not just a single document.

11 With regard to the issue of the scope of discovery and
12 jurisdiction, Mr. Rapawy talked about the Supreme Court
13 decision in *NML Capital*. Any suggestion that the Court's
14 holding in that case is limited to circumstances involving
15 execution proceedings with a foreign sovereign has been found
16 liable is not credible. The holding of that case is that there
17 are no special rules with regard to discovery in FSIA cases.
18 The FSIA says nothing about discovery, and the federal rules
19 authorize discovery.

20 And the last thing I would say, your Honor, is the
21 suggestion that was made that Bayoumi was in the United States
22 receiving multiple master's degrees and performing a diligent
23 course of study is not supported by the documents. There's an
24 entire year. The papers describe it, but the documents do not
25 reflect a serious course of study that he was somehow here for

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1 seven years and extended for another two years when he was
2 going elsewhere. So it's just not credible, your Honor. Thank
3 you.

4 THE COURT: Thank you.

5 Mr. Shen.

6 MR. SHEN: Your Honor, I will be very brief discussing
7 the supplemental discovery issues.

8 First, to address the point that Mr. Carter made,
9 they're simply wrong that ordinary rules of civil discovery
10 apply to jurisdictional discovery at issue here. This Court in
11 its March 28 order was explicit that jurisdictional discovery
12 should be limited, targeted and circumspect. The Second
13 Circuit has held that a sovereign under FSIA jurisdictional
14 discovery, that any discovery must be balanced against that
15 sovereign's legitimate interest to immunity and to comity
16 concerns. And the Second Circuit has also held that any
17 jurisdictional discovery requires a non-speculative basis to
18 believe that that discovery will lead directly to jurisdiction
19 in this case. Now to that end, this Court has already
20 instructed the parties that it will carefully scrutinize any
21 request, and that those requests for discovery must be tethered
22 specifically to the allegations at pages 19 to 23 of Judge
23 Daniels' order.

24 With respect to supplemental discovery requests, that
25 involves three individuals. They are incredibly broad

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1 requests. They indiscriminately asked for all responsibilities
2 for these individuals, all activities of these individuals in
3 the State of California, notwithstanding the fact that two of
4 the individuals actually lived in California during the
5 relevant period. So effectively plaintiffs are asking for
6 every single act that these individuals conducted during the
7 relevant time period. They asked for diplomatic status, all
8 travel that these individual engaged in, all contacts that
9 these individuals had with a laundry list of other individuals,
10 who they supervised, who supervised them, and the
11 responsibilities of those individuals. Those requests aren't
12 at all tethered to the specific allegations in pages 19 through
13 23 of the Court's March 28 order.

14 Your Honor has our papers in front of her. What we
15 have done is proposed what we would submit is a very reasonable
16 broad discovery of those three individuals. In broad strokes,
17 we have agreed to conduct a search of the embassy and the
18 consulate. The embassy is where Al Jarrah worked, the
19 consulate is where Mr. Muhanna worked. And we have agreed to
20 pull every document in those two diplomatic missions that even
21 reference any of the three individuals. And we'll produce
22 those documents to the plaintiffs, notwithstanding the fact
23 that all of those documents would otherwise be completely
24 immune from discovery because they're inviable under the Vienna
25 Convention. In addition, the kingdom has offered to go to the

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1 actual ministries that employed these individuals to conduct
2 searches of those ministries.

3 So your Honor asked the question about the Ministry of
4 Islamic Affairs with respect to Al Muhanna, who worked at the
5 Ministry of Islamic Affairs. We agreed to go there and do a
6 broad-based search for documents responsive to their
7 supplemental request.

8 THE COURT: So you would be searching not just for
9 personnel files but for documents, including assignments,
10 tasks, et cetera?

11 MR. SHEN: That's right, your Honor.

12 With respect to Al Mana, there's no basis to believe
13 that Al Mana was employed by the Ministry of Islamic Affairs,
14 but in our papers we had also agreed to conduct a search to see
15 whether or not Ministry of Islamic Affairs has a personnel file
16 and if there are other documents at the Ministry of Islamic
17 Affairs that contain responsive information.

18 With respect to Al Jarrah, he was an employee of the
19 Ministry of Education. We have agreed to go to the Ministry of
20 Education to look for his personal file. We have also agreed
21 to go to the Imam Muhammad bin Saud University to search for
22 his personnel file. And with respect to these personnel files,
23 we are going to be producing every document contained in those
24 personnel files regardless, so they would get a broad scope in
25 response to this request. And of course, they're going to get

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1 every document that is at the consulate and at the embassy as
2 well.

3 THE COURT: Could I ask you to speak up a little bit?

4 MR. SHEN: Sure. We have also agreed to conduct
5 additional targeted searches at other ministries. For
6 instance, we agreed to search the Ministry of the Interior for
7 passport renewal records for entry and exit information. And
8 we have also agreed to ask these individuals whether they will
9 voluntarily produce their passports. We did the same thing
10 with Mr. Al Bayoumi, Mr. Al Thumairy and Al Suwaylim, and they
11 received documents through that process.

12 And so we believe that this proposal is inherently
13 reasonable. If the Court has any specific questions on
14 particular requests, I am happy to answer those questions.

15 THE COURT: With respect to the request for day-to-day
16 activities, on the one hand I understand your objection that
17 that could encompass one's entire life. You've already
18 answered through your colleague that there wasn't that much
19 email traffic at this time, but are there calendars, are there
20 memos or reports to supervisors that would give us any
21 indication as to what these three individuals were doing?

22 MR. SHEN: I think the answer is different with
23 respect to the three individuals. With respect to Al Muhanna,
24 he was assigned to the King Fahd Mosque as an imam, and our
25 understanding, based on our intelligence, based on our

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1 interview with Mr. Muhanna -- we actually traveled to Riyadh
2 immediately after the Court's November 29 meeting to meet with
3 Mr. Muhanna -- is that we don't expect there to be the type
4 documents that the Court has referenced. And that's because
5 his job was to lead prayer several times a day, and our
6 understanding is there's not a lot of documentary record of his
7 activities.

8 With respect to Al Mana, he was working on a
9 day-to-day basis in the LA consulate. So to the extent that we
10 are pulling every document that references Al Mana, plaintiffs
11 are going to get documents pertaining to his day-to-day
12 activity.

13 The same is true with respect to Al Jarrah. He was
14 working inside the embassy in Washington DC, so with respect to
15 the request pertaining to him, they are going to get his
16 day-to-day activity also because we also agreed to pull every
17 reference to Mr. Al Jarrah.

18 THE COURT: Specific targeted question about
19 calendars, which can sometimes be incredibly illuminating.
20 Have you see looked to whether or not there are calendars in
21 the relevant time?

22 MR. SHEN: We have. That's a specific search we
23 conducted.

24 THE COURT: And if you found anything, I presume you
25 turned it over.

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1 MR. SHEN: Yes, your Honor.

2 THE COURT: Okay. I think you answered all of my
3 questions.

4 MR. SHEN: Thank you, your Honor. I'm happy to
5 address the sealing order as well.

6 THE COURT: Let me give the Plaintiffs' Executive
7 Committee an opportunity, if they wish, to respond to this
8 particular area of discovery.

9 MR. POUNIAN: Yes, your Honor, briefly.

10 First of all, Mr. Shen referred to some Second Circuit
11 cases on the jurisdictional discovery issue. Those are
12 commercial cases, your Honor, they don't involve the same
13 considerations as JASTA and the considerations of comity that
14 are involved in a case involving criminal activity inside the
15 United States. And I submit to the Court that in that
16 situation, in the JASTA situation, the balance is completely
17 different than in a commercial setting in terms of comity,
18 because the comity of the United States is directly involved in
19 the attack, in the 9/11 attacks.

20 In terms of the personnel files, your Honor, in their
21 submissions they said personnel files should contain most, if
22 not all, of the documents regarding an employee's duties,
23 responsibilities, functions, authorities and secondments.
24 That's what they said in their letter to the Court, the brief
25 on December 14.

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1 What we know from Mr. Thumairy's personnel file, who
2 was working alongside Mr. Muhanna, is that it didn't include
3 any of those things. And we are very concerned. We hear all
4 the words about the search. There's no proof of anything.
5 There's no affidavit to support any of the searches that have
6 been conducted. We have not gotten a single calendar that's
7 been produced in the case.

8 So we have a sharp concern about what is actually
9 going to be produced. If they're saying it's going to be a
10 personnel file, the concern is what they have done to date is
11 simply produce personnel files and go through sort of a cursory
12 search, which is the reason why they didn't find any of the
13 documents regarding Mr. Thumairy which they should have found.
14 And there should have been many documents regarding all the
15 supervision that he did of propagators in California, and there
16 was not a single document. So that is the concern. I'm
17 throwing out that question mark, your Honor, and Ms. Benett
18 will be arguing the sealing motion.

19 THE COURT: Okay. Let's take a three-minute recess.

20 (Recess taken)

21 THE COURT: All right. So the last topic on my agenda
22 is to discuss the motion to seal. This is another motion that
23 I'm going to take under advisement. I have read everybody's
24 excellent briefs as well as the letter that was filed on behalf
25 of the New York Times. And so I had a few questions to pose,

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1 but if there's some opening remarks you want to make, I'm happy
2 to hear from you.

3 MR. SHEN: Thank you, your Honor.

4 Currently there are 218 documents that have been filed
5 in connection with the motion to compel and the supplemental
6 discovery motions that are under seal. 136 of those documents
7 were produced by the kingdom, they have kingdom Bates numbers
8 on them.

9 The kingdom is not seeking to seal the entirety of the
10 discovery record or all communications within the Saudi
11 government, instead we have very narrowly and carefully
12 identified documents that are not appropriate for public
13 disclosures. And those documents consist of 73 Bates numbered
14 documents that we're seeking to seal in their entirety and 12
15 documents that are we seeking to redact.

16 Now the redactions involve personal information,
17 financial information. I don't believe that's a dispute.
18 Currently the plaintiffs have stated that they're willing to
19 meet and confer about that issue.

20 THE COURT: Have you given them proposed redactions?

21 MR. SHEN: Yes, your Honor.

22 THE COURT: Have they had an opportunity to respond to
23 that?

24 MR. SHEN: We have not met and conferred about that,
25 but they certainly have had the opportunity to respond.

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1 THE COURT: Okay. Maybe with respect to the
2 redactions, which I believe is in the plaintiff's reply or
3 opposition, indicated that things like Social Security numbers
4 and medical information and the like they would not object to.
5 Maybe if I could just ask the parties to in fact complete that
6 meet and confer and submit a letter to me in a week, does that
7 seem like a reasonable amount of time on that very narrow
8 issue?

9 MR. SHEN: Yes, your Honor.

10 MS. BENETT: That's fine, your Honor.

11 THE COURT: I'm not at my desk so I don't have my
12 calendar, but I believe it's March 5th. So let's have a joint
13 letter on March 5th letting me know the status of those limited
14 redactions. So that would then just leave us with the 73
15 documents that the kingdom is seeking to file under seal.

16 MR. SHEN: Yes, your Honor. With respect to those 73
17 documents, those are traditionally non-public government
18 documents. The government documents of a foreign sovereign
19 have a higher interest, and international comity and privacy
20 and other privileges, as your Honor alluded to earlier, the
21 deliberate process privilege, justify the sealing of those
22 documents.

23 And your Honor is aware that there's no absolute right
24 to public access to judicial documents. The Second Circuit in
25 the *Lugosch* decision said that the weight of any presumption

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1 sits on a sliding scale. The weight of that presumption is
2 highest when the Court is conducting its core adjudicatory
3 functions, when its deciding the merits on the case, when the
4 actual case is in the merits.

5 The Second Circuit has also said that the presumption
6 of public access is at its lowest where the discovery documents
7 are before the Court solely for the Court to ensure their
8 irrelevance.

9 Now here, of course, we're not in the context of
10 summary judgment, as was the case in *Lugosch*. We're not on any
11 adjudicatory proceeding on the merits. We are in
12 jurisdictional discovery in the context of a motion to compel.
13 And the discovery documents that are before the Court are
14 before the Court so that the Court can decide whether or not
15 those documents suggest that the kingdom should conduct
16 additional searches for other documents. And in this context,
17 we would submit that the weight of the presumption of public
18 access is at its lowest.

19 The Second Circuit has also made clear that whatever
20 presumption applies, that presumption of public access needs to
21 be balanced, it need to be weighed against countervailing
22 factors and against higher values, including higher values of
23 international comity, including whether the documents that are
24 sealed are sensitive documents containing traditionally
25 non-public government information, which these documents are,

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1 and it needs to be balanced against privacy rights and other
2 privileges like the deliberative process privilege.

3 Now I mentioned that there are 73 documents we're
4 seeking to seal. The lion's share of those documents, 63 of
5 those documents, are protected under the Vienna Convention.
6 And what the Vienna Convention provides is that all archives
7 and documents of diplomatic missions, as well as all
8 correspondence relating to the functions of a diplomatic
9 mission, are inviolable. The Second Circuit has held in the 767
10 *Third Avenue v. Republic of Zaire* case that there are no
11 exceptions to that inviolability.

12 THE COURT: How does the fact that you produced the
13 documents affect that analysis?

14 MR. SHEN: Your Honor, the circuit courts have held
15 that diplomatic documents protected by the Vienna Convention
16 are completely immune from discovery. The only reason that the
17 plaintiffs have these documents is because we voluntarily
18 disclosed the documents.

19 The case law is also clear that you do not waive
20 inviolability of diplomatic documents by producing them. In
21 fact, the Vienna Conventions themselves have no provision for
22 the waiver of inviolability of diplomatic documents. To the
23 extent that they address a waiver rule at all, and that's only
24 in the context of the privileges and immunities given to
25 consular officers, they make clear that any such waiver must be

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1 expressed and it must be in writing. Of course, that hasn't
2 occurred here. And I refer the Court to the Vienna Convention
3 on Consular Relations, Article 45, which sets that out
4 explicitly.

5 Moreover, the fact that the kingdom has produced the
6 documents voluntarily for purposes of this litigation does not
7 mean it's waived its higher interest in the confidentiality of
8 those documents. The law recognizes that a party may produce
9 documents for litigation purposes while continuing to assert
10 that the documents should remain confidential. And that's
11 especially true in the case of a foreign sovereign with respect
12 to documents that have a legitimate confidentiality interest or
13 that are protected by privilege.

14 And there I would point the Court to two cases that
15 were cited in our brief, the *Strauss v. Credit Lyonnaise* case
16 in the Eastern District of New York, and the *Omari v. Al Khaima*
17 case out of the Southern District of New York. In both cases a
18 foreign sovereign produced documents and the courts held that
19 the mere production of those documents doesn't mean that you
20 waive your interest in confidentiality. And given higher
21 interests in international comity and given the confidentiality
22 interests of that foreign sovereign, the court determined that
23 those documents were required to be held under seal.

24 So with respect to the Vienna Convention, as I
25 mentioned, the vast majority of the documents at issue are

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1 subject to that protection. The kingdom produced those
2 documents voluntarily, but it produced those documents in
3 reliance on the protections of this Court's protective order
4 and in reliance on the procedures for filing documents under
5 seal.

6 In the same way the FBI has produced documents in
7 response to plaintiffs' subpoenas, every single one of those
8 documents, to the extent it's been attached to a public filing,
9 has been permanently sealed. Every discussion of those
10 documents has been permanently redacted, and no party has
11 objected to the sealing of that material. Interests of comity
12 also dictate that the kingdom's documents, the most sensitive
13 documents from its diplomatic missions, should also be kept
14 under seal.

15 If the Court were to decide that some of these
16 diplomatic documents that have been produced from the kingdom's
17 missions should appear on the public docket, the kingdom may
18 need to take serious consideration into whether it will produce
19 these documents voluntarily. These are documents that the
20 plaintiffs are not entitled to, they're completely immune from
21 discovery, and this is a very sensitive topic that the kingdom
22 would need to consider further.

23 Now the remaining categories of protection for the
24 documents, there's 32 documents that are also highly sensitive
25 internal communications. These are high level communications

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1 of Saudi officials from the deputy minister level or above.
2 Now these 32 documents, they overlap substantially with the
3 Vienna Convention documents, so there's only eight documents
4 that fall in this category that are not protected by the Vienna
5 Convention.

6 Now with respect to these documents, the majority of
7 those documents are themselves labeled confidential and/or
8 secret. This is akin to a US document that has been labeled
9 classified or secret, and interests of comity dictate that
10 those documents, high level communications involving sensitive
11 topics of high level Saudi officials, those should be kept
12 under seal as well.

13 We mentioned deliberative process earlier in this
14 argument. There are 21 documents that fall under that
15 category. However, every single one of those documents are
16 either protected independently by the Vienna Convention or also
17 protected because they are high-level communications between
18 Saudi officials. The law recognizes that the deliberative
19 process privilege is designed to protect open and frank
20 discussion. Those documents should also be protected here.

21 THE COURT: In order to qualify under the deliberative
22 process privilege, do you believe you need to make a more
23 detailed showing about the nature of the deliberation, who was
24 involved in it, what the ultimate outcome was? The law seems
25 to put a high burden on parties seeking to rely on the

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1 deliberative process privilege.

2 MR. SHEN: With respect to that category, the
3 documents, we would submit, on their face show what the
4 deliberations are, what the recommendations were being made,
5 and the deliberations between the various Saudi government
6 officials that did or did not lead to an ultimate government
7 decision.

8 I do want to note that all of the final decisions here
9 where we have asserted the deliberative process privilege,
10 they're all ancillary to the central allegation in the case.
11 They're not deliberations on whether to provide instructions to
12 Mr. Al Bayoumi or Mr. Al Thumairy to assist the terrorists. In
13 fact, no such instructions were ever given or contemplated.
14 They are completely ancillary. They are things like whether to
15 continue the employment of some individual, whether to expend
16 his secondment, that sort of ancillary --

17 THE COURT: Some individual or Bayoumi or Thumairy?

18 MR. SHEN: Certainly with respect to -- there are
19 certain documents pertaining to Al Thumairy and Al Bayoumi, but
20 there's also documents --

21 THE COURT: But that seems like it goes to core of
22 what the plaintiffs are seeking. Their argument that they
23 presented earlier this afternoon is that these officials were
24 basically placed in Southern California with a particular
25 agenda directed by the kingdom. I know that you vehemently

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1 dispute that characterization, but that's their argument. And
2 particularly with respect to Mr. Bayoumi, there's been some
3 documents to suggest that his secondment to Dallah Avco was a
4 sham of some sort. And so to the extent that there are
5 documents reflecting the decision to impose upon Dallah Avco
6 that they renew his secondment, that doesn't seem ancillary at
7 all to me.

8 MR. SHEN: Those documents, to be clear, have been
9 produced to the plaintiff. So the question is not whether we
10 searched for and produced those documents, the question is
11 whether or not those documents are protected by the
12 deliberative process privilege. And the documents that fall
13 within that category are pre-decisional documents, they're
14 communications between Saudi officials pertaining to those
15 final decisions, but they're not the final decisions
16 themselves, and the law recognizes that those should be kept
17 confidential.

18 THE COURT: All right.

19 MR. SHEN: The other categories of documents, there
20 are two documents that are protected by the Federal Educational
21 Rights and Privacy Act. I don't know that there's any dispute
22 with the plaintiffs with respect to those documents. Those
23 protect information, for instance, in Mr. Al Bayoumi's
24 transcript and his grades.

25 The plaintiffs have made the argument that some of the

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1 information in these 73 documents is already public. As an
2 initial matter, the presence of some publicly available
3 information doesn't render the entire document public. The
4 Second Circuit has addressed that issue in the *United States v.*
5 *Amodeo* case. And in any event, plaintiffs are just wrong in
6 asserting that these documents contain information that's
7 already public.

8 In Exhibit C, which accompanies our January 25th
9 submission, we have painstakingly gone document by document and
10 identified the non-public information that is contained within
11 those documents. Plaintiffs have consistently and falsely
12 asserted that information in the sealed documents has been made
13 public.

14 Your Honor referenced a flurry of letters that came in
15 last week. Plaintiff's February 20 letter made reference to
16 information that is only available in a sealed document that
17 was produced from a Saudi diplomatic mission. We pointed that
18 issue out to the Court on the 21st. The plaintiffs wrote a
19 letter to the Court on the 22nd where they claim that the
20 information was made public in a heavily redacted FBI document.
21 We have that document here. The very information that
22 plaintiffs claim was available in that redacted FBI document
23 was in fact redacted. So that is a blatant violation of the
24 protective order, but more foundationally, it is just an
25 example that plaintiffs' assertion that information is public

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1 is not true. We detailed all the information that is not
2 public in Exhibit C accompanying our January 25th letter.

3 THE COURT: Thank you very much.

4 Ms. Benett.

5 MS. BENETT: Thank you, your Honor.

6 Let me start with that last point about publicly
7 available information, that the defendant's representation that
8 everything are in their proposed sealed documents is not
9 public. With respect to the reference to Al Thumairy, as we
10 said in our February 22nd reply -- which, by the way, the
11 kingdom never moved to seal our reply in which we said that
12 Thumairy was an administrative officer of the kingdom, which
13 any Google search would reveal, nevertheless, that title is a
14 piece of information that the kingdom continues to assert has
15 to be under seal.

16 And I think one of reasons that we're in the situation
17 that we're in now is Judge Casey's original order in 2006
18 granted almost entirely the kingdom's request -- the
19 Defendants' Executive Committee's request with respect to a
20 confidentiality protective order covering discovery documents
21 on a generalized good cause showing that, as Judge Casey said,
22 would not ordinarily be sufficient to warrant the protective
23 order, but under the unique circumstances of the case at that
24 time, he would rely upon, in granting the protective order,
25 that would pertain only to the discovery documents. And

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1 despite the kingdom's representation recently that that order
2 didn't contemplate the issue of judicial filings, that's not
3 accurate. The kingdom's proposed order had a paragraph
4 concerning judicial -- the filing of any designated
5 confidential documents under seal, and Judge Casey rejected
6 that. It was the only part of the proposed order that he did
7 reject.

8 So they're working from what I would call sort of a
9 liberalized perspective with respect to their ability to
10 designate documents as confidential that was based only on this
11 generalized good cause showing. Then they've leveraged that
12 now to keep every document that they marked as confidential
13 sealed since the end of July until today. They have been
14 producing documents from March until July, and when they
15 produced the documents in July, the only information we had
16 about the basis for the confidentiality designation was the
17 name of the document custodian. They listed where the document
18 came from and gave us no other argument for why those materials
19 were confidential.

20 Now at this stage what we have is barely more. We
21 have statements about the Vienna Convention and statements
22 about deliberative process. To the Court's question of
23 deliberative process, the very issue we are litigating is
24 whether kingdom officials tasked Bayoumi and Thumairy with
25 assisting the hijackers. Any decision the kingdom made, any

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1 decision-making process about tasking Thumairy and Bayoumi that
2 may be in these documents goes to the heart of the substance of
3 litigation. It's completely outside of the deliberative
4 process exception.

5 And even if it fell within the deliberative process
6 exception, the kingdom hasn't done anything to meet, as the
7 Court knows, the standards required to assert that protection.
8 They haven't produced -- just like with the discovery
9 materials, we haven't seen a single sworn statement from a
10 records custodian or from an agency head, which is what they
11 have to produce if they're asserting that privilege. So
12 they're relying on conclusory statements by counsel to assert
13 the deliberative process exception when it doesn't even apply
14 to begin with.

15 The Vienna Convention they're asserting -- let me
16 point the Court's attention to a couple of documents listed in
17 their log, one that was filed as Plaintiffs' Exhibit 53, which
18 was Bates stamped KSA 1830 and 1831, which are documents that
19 we received independently through third-party subpoenas that
20 are simply certificates of completion for English language
21 studies issued to Bayoumi. But the kingdom has designated it
22 as confidential because they chose to produce that through
23 their consulate and through their embassy.

24 And the fact they're using the repository of the
25 information as a sword to protect themselves from any

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1 disclosure is not what the Vienna Convention contemplates. As
2 the Times said in its letter to the Court, the Vienna
3 Convention addresses the privileges a diplomatic mission enjoys
4 with respect a host country and establishes that the host
5 country cannot interfere with the guest country's diplomatic
6 relations.

7 The documents they have produced, they have not made a
8 sufficient showing that those materials and the information in
9 there are core to the diplomatic mission without a specific
10 factual showing that those communications would be core to the
11 diplomatic mission, putting aside the waiver issue, which we
12 still assert. By producing the material, they have already
13 waived whatever argument they may have had with respect to the
14 convention, but they have yet to put forth a specific factual
15 showing as to how the information in those materials produced
16 from the consulate and from the embassy are core to the
17 diplomatic mission. The Vienna Convention simply doesn't
18 contemplate protecting that from the public.

19 THE COURT: Could I ask you to take a step back -- not
20 physically, stay near the microphone -- and talk to me about
21 the continuum that the *Lugosch* case addresses. Because one
22 thing that I think is critical for me to evaluate on this
23 particular motion is where, on that continuum that the Second
24 Circuit has instructed me to think about, where this
25 application falls.

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1 And as was discussed previously by defense counsel,
2 this is not a motion to dismiss, this is not a motion for
3 summary judgment, these documents are being used to support and
4 reject arguments about the completion of discovery. And so I'm
5 not even being asked to rely on them so much for the facts of
6 their statement but rather what they show about the possibility
7 of more discovery. It seems to me that, given what the
8 substantive motion is, the discovery motion, that we're pretty
9 low on the continuum that the Second Circuit has instructed
10 courts to think about.

11 MS. BENETT: So I think that might be true were
12 discovery not so inextricably intertwined here with subject
13 matter jurisdiction. Essentially what we are litigating at
14 this stage is access to information that will be dispositive in
15 this case. And that's why on the *Lugosch* continuum, the
16 Court's adjudicatory function is at its maximum.

17 This discovery dispute is not an ordinary argument
18 over a deposition protocol or over an interrogatory response,
19 this is core to the Court's subject matter jurisdiction that is
20 going to determine whether or not this Court continues to hear
21 the 9/11 case or dismisses it in the kingdom's favor. So I
22 would say that certainly there is a continuum, but this falls
23 far on the side of the Court's key adjudicatory function at
24 which point the public's right to access the information is at
25 its apogee.

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1 THE COURT: I appreciate both the subject matter of
2 this case and the significance of the discovery disputes before
3 me, but I am instructed to follow a higher authority, the Court
4 of Appeals, and I'm unaware of cases that would allow me to
5 move the needle along the continuum because the case is really
6 significant or because discovery will make or break the case.
7 And I don't say that to undermine the seriousness of the case
8 and of the discovery before me, but at the end of the day, this
9 is a discovery dispute, and typically the public's right to see
10 documents that are being attached in support or against further
11 discovery is pretty low.

12 MS. BENETT: So I will take maybe two steps back and
13 talk a little bit about -- just very, very briefly, about both
14 the Justice Against Sponsors of Terrorism Act and the recent
15 senate resolution that passed unanimously last fall, both of
16 which contained specific expressions of support from the United
17 States government that this particular litigation was to give
18 plaintiffs the broadest possible relief available, and in the
19 senate resolution in particular, was in support of public
20 access to the information about the 9/11 investigation and the
21 specific liability facts underlying this lawsuit. So I would
22 say that this is -- I understand the Court appreciates this,
23 but the discovery issues are unique and are different than in
24 any other civil litigation.

25 So starting from that perspective, and then

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1 understanding that, just as in a summary judgment motion, the
2 issue is not whether it's a summary judgment or a motion to
3 dismiss, I believe the same standard would apply under a
4 12(b)(6) motion, that it's whether the case is at a dispositive
5 stage. And so if the issues that we're litigating now go to
6 the core of subject matter jurisdiction, and therefore go to
7 the viability of the lawsuit itself, the public's interest is
8 at its maximum.

9 THE COURT: Okay.

10 MS. BENETT: I would just point out that we saw today
11 some of the problems we're having with engaging in a robust
12 conversation about the issues when we are hamstrung by the
13 kingdom's unilateral designation of information as
14 confidential. We presented not just the kingdom, some of the
15 other defendants as well, the document that we obtained from
16 the California Secretary of State reporting the appointment of
17 the board of directors at the King Fahd Mosque, the seven Saudi
18 high-level officials. That had been produced by the mosque
19 itself with the mosque designating it as confidential, where
20 that information was obtainable from a public source by
21 plaintiffs so we could share it with the Court. If we hadn't
22 been able to get that, we would have been restricted in our
23 ability to discuss that in open court in front of the press, in
24 front of the public, in front of our clients.

25 The same issue arises with the discussion about the

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1 propagators' conference in Los Angeles, which we were able to
2 discuss openly only because we had obtained the transcript from
3 to the Abdi Mohamed trial, which specifically refers to the
4 July 1999 ten-day conference in Los Angeles. If we had relied
5 only on the kingdom's unilaterally designated confidential
6 materials, we couldn't have discussed that publicly. There's
7 no reason that that discussion should have been sealed from the
8 public.

9 So I think that's the risk that we're facing, and
10 that's the reason that we believe that the kingdom's
11 representations in its log filed with this Court on January 15
12 are simply insufficient for the extraordinary sealing of what
13 everybody has agreed are judicial documents. I think the
14 disagreement is where on the spectrum of the right to public
15 access do they fall. Thank you.

16 THE COURT: Thank you very much.

17 All right. Mr. Shen, anything to add? I don't want
18 to belabor it, I think I understand your argument.

19 MR. SHEN: No, your Honor, thank you.

20 THE COURT: Let me end the same way that I began --

21 Oh, yes?

22 MR. RAPAWY: I'm very sorry, your Honor, but on the
23 question -- we had had an outstanding request for a briefing
24 schedule on the identity and number of deponents, and the Court
25 had kind of put that off. And I understand the Court's ruling

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1 on that but didn't want it to slip through the cracks entirely.
2 Would your Honor consider setting a schedule for that when you
3 issue your ruling on the motion to compel?

4 THE COURT: You want a schedule on briefing of the
5 number of depositions, is that what you're seeking?

6 MR. RAPAWY: Yes. Your Honor had directed plaintiffs
7 to give us a preliminary list, and we got that preliminary list
8 back, and it contains, by my count, more than 60 depositions.
9 So we're pretty far apart on the number of the depositions. I
10 think it would help move the case forward if we move that
11 argument forward.

12 THE COURT: I guess my concern is I am assuming that
13 the plaintiffs are going to tell me that until they receive the
14 final tranche, or at least the next tranche, which I think is
15 coming in March from the FBI, that they're not going to be in a
16 position to know the full scope of the depositions they want.
17 So they may be saying 60 now but they may be saying 100 later.

18 MR. RAPAWY: That wouldn't surprise me, your Honor. I
19 had thought your Honor previously ruled that the scope of --
20 the duration of the jurisdictional discovery was not going to
21 be extended because of any delays in the FBI production, and
22 that was basis for our position.

23 THE COURT: I'm sure I did rule that at some point.

24 Where are you all on figuring out how many depositions
25 you want to take?

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1 MR. CARTER: Your Honor, I think, first of all, we
2 would like to see the totality of the universe of witnesses,
3 including based on any further discovery your Honor directs the
4 kingdom, so we could make informed choices about who we want to
5 depose rather than arguing in a vacuum and then coming back to
6 your Honor and saying oh, there are ten more important people
7 that we just learned about, and we need to brief this all over
8 again. It all seems premature and only likely to invite
9 iterative briefings before your Honor.

10 In terms of the number of people on the list we
11 provided to the kingdom, it's a fraction of the people
12 identified in the kingdom's documents that have relevant
13 information. We're hopeful the kingdom will say we'll produce
14 all the people and it will agree to produce all these people,
15 but the first step is your Honor directed us to meet and
16 confer. We would like to get an understanding about whether
17 they have objections to producing anyone. We want to gather
18 that kind of information. It's just way too early to start
19 briefing this in a vacuum.

20 THE COURT: Do you know when the FBI is making its
21 next production?

22 MR. CARTER: My understanding is March 15, your Honor.

23 THE COURT: Okay. I think I will not set a briefing
24 schedule now, but I will keep it on my to-do list.

25 MR. RAPAWY: Thank you, your Honor.

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1 THE COURT: So I will end the same way I began, which
2 is the briefing on all these motions was excellent, so thank
3 you for that.

4 To the families who are here, again I want to thank
5 you for coming. I know a lot of this may go over your head
6 because it's a lot of lawyer talk, and I am incredibly
7 sympathetic about the fact that it's 2019 and this process
8 feels like it's still in the beginning phases. Know that the
9 Court takes this case very seriously, know that we are working
10 incredibly hard to move the case forward.

11 I will turn to these motions, which I appreciate are
12 so important to the lawyers and to the families as quickly as I
13 can. Yours is not my only case, but I will prioritize getting
14 this done. It will probably be a few weeks, at least, before I
15 get a decision out, so don't bother your lawyers this week to
16 find out.

17 And the other thing that I will just say is some of
18 the stuff we have been talking about here is the serious issues
19 that are presented in this case. Given the events of 9/11, and
20 my obligation as a federal judge and my obligation to apply the
21 law as I believe it needs to be applied, it may at times feel
22 arbitrary or inconsistent with your larger concerns or larger
23 mission, and know that I am one piece of your own efforts for
24 resolution personally. And so I just want you to know that I
25 see my job as both an effort for closure to this incident, this

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1 tragedy, but also needing to protect the rule of law and the
2 cases that have come before this one, and to make sure that
3 justice is done for all parties. And so I thought I would
4 mention that since so many of you are here today.

5 So with that, we are adjourned. Thank you everybody.

6 MR. POUNIAN: Thank you, your Honor.

7 MR. RAPAWY: Thank you, your Honor.

8 (Adjourned)